



Senate Committee On  
**HEALTH, AGING, AND  
LONG-TERM CARE**

Burt L. Saunders, Chair  
Dennis L. Jones, D.C., Vice Chair

**Meeting Packet**

Monday, April 19, 2004

1:45 p.m. – 3:45 p.m.

412 Knott Building

***(Please bring this packet to the committee meeting.  
Duplicate materials will not be available.)***

# E X P A N D E D      A G E N D A

## COMMITTEE ON HEALTH, AGING, AND LONG-TERM CARE

Senator Saunders, CHAIR  
Senator Jones, VICE-CHAIR

DATE: Monday, April 19, 2004

TIME: 1:45 p.m. -- 3:45 p.m.

PLACE: The Pat Thomas Committee Room, 412 Knott Building

(MEMBERS: Senators Aronberg, Carlton, Dawson, Diaz de la Portilla, Dockery, Fasano, Peaden, Villalobos, Wasserman Schultz and Wilson)

TAB	BILL NO. AND INTRODUCER	BILL DESCRIPTION AND SENATE COMMITTEE ACTIONS	COMMITTEE ACTION
1	SB 2902 Jones (Similar H 1655)	Health Care Advance Directive; provides fee for persons participating in health care advance directive & blood-type registry; provides fee for persons applying for ID card who choose to participate in health care advance directive & blood-type registry; provides fee for persons applying for driver's license who choose to participate in health care advance directive & blood-type registry, etc. Creates 320.08049; amends Ch. 765, 322.051,.08.  HC      04/12/04 Temporarily postponed HC      04/19/04 AHS AP	
2	SB 2948 Margolis (Compare H 1639, H 1821)	Sovereign Immunity/Medical Schools; provides sovereign immunity to certain colleges, universities, & medical schools that provide patient services to publicly-funded patients in public hospitals & to employees of those entities; provides definitions.  HC      04/12/04 Temporarily postponed HC      04/19/04 JU AED AP	
3	SB 1454 Bennett (Compare H 0209, H 0653, CS/CS/S 0440, CS/S 0664)	Nurse Registries; deletes provisions requiring that registered nurse periodically visit home of each patient who is attended by certified nursing assistant or home health aide referred by nurse registry, in order to assess patient's medical condition & quality of care that is being provided to patient, & deletes provisions requiring specified reports & recordkeeping re such assessments. Repeals 400.506(10)(c).  HC      04/19/04 AHS AP RC	

# EXPANDED AGENDA

## COMMITTEE ON HEALTH, AGING, AND LONG-TERM CARE

DATE: Monday, April 19, 2004

TIME: 1:45 p.m. -- 3:45 p.m.

TAB	BILL NO. AND INTRODUCER	BILL DESCRIPTION AND SENATE COMMITTEE ACTIONS	COMMITTEE ACTION
4	CS/CS/SB 2262 Education / Smith et al (Similar H 1379, Compare H 0223, CS/S 1140, S 3044)	Psychotropic Medications/Minors; creates Center for Juvenile Psychotropic Studies within Psychiatry Dept. of College of Medicine of University of Florida; provides purpose of center; creates advisory board; requires center to work with CFS Dept., Juvenile Justice Dept., AHCA, & DOH; requires certain data re dependent minors for whom psychotropic medications have been prescribed to be made available to center, as legally allowed, etc. Amends FS.	
		CF 03/17/04 CS ED 03/31/04 Not considered ED 04/13/04 CS/CS HC 04/19/04 AED AP	
5	SB 3018 Peadar (Compare H 0701, H 1629, CS/S 2022, CS/CS/CS/S 2910)	Health Care/Medical Procedure/Prices; requires certain licensed health care facilities to electronically publish prices for certain medical procedures; provides that patient has right to receive estimate of charges prior to treatment. Amends 381.026, 395.301.	
		HC 04/19/04	
6	<del>CS</del> /SB 2014 Wasserman Schultz	Public Swimming Pools; requires such pools to be enclosed by barrier; establishes additional safety requirements; requires inspections; provides penalties for violations; provides definitions & for application. Creates 514.0305.	
		CP 03/29/04 Not considered CP 04/16/04 <del>Fav/CS</del> HC 04/19/04 <del>if received</del> CP 04/20/04 AGG AP	
7	SB 2604 Diaz de la Portilla (Identical H 1375)	Naturopathic Medicine; changes title of ch. 462, F.S., from "Naturopathy" to "Naturopathic Medicine"; creates Board of Naturopathic Medicine; provides guidelines for probable cause panels & disciplinary decisions; provides powers & duties of board under said chapter, including rulemaking authority; provides requirements for licensure as naturopathic physician, etc. Amends FS.	
		HC 04/19/04 CJ AHS AP	

# E X P A N D E D     A G E N D A

## COMMITTEE ON HEALTH, AGING, AND LONG-TERM CARE

DATE: Monday, April 19, 2004

TIME: 1:45 p.m. -- 3:45 p.m.

TAB	BILL NO. AND INTRODUCER	BILL DESCRIPTION AND SENATE COMMITTEE ACTIONS	COMMITTEE ACTION
<u>WORKSHOP</u> -- Discussion and testimony only on the following (no vote to be taken):			
8	SB 0092 Cowin et al (Compare H 0179, S 2296)	Women's Health & Safety Act/Abortion; provides popular name; revises requirements for rules of AHCA re abortions performed in abortion clinics; provides for rules re abortions performed after first trimester of pregnancy; requires abortion clinics to develop policies to protect health, care & treatment of patients. Amends 390.012.	
		HC     04/19/04 Workshop JU AHS AP	
9	SB 2296 Haridopolos (Identical H 0179, Compare S 0092)	Women's Health & Safety Act; revises requirements for rules of AHCA re abortion clinics performing abortions after first trimester of pregnancy; requires such clinics to develop policies to protect health, care, & treatment of patients; provides that rules regulating abortion clinics may not impose unconstitutional burden rather than legally significant burden on woman's right to choose to terminate her pregnancy, etc. Amends 390.012.	
		HC     04/19/04 Workshop JU GO AHS AP RC	

## SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

BILL: SB 2902

SPONSOR: Senator Jones

SUBJECT: Health Care Advance Directive and Blood-type Registry

DATE: April 8, 2004

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Harkey <i>dh</i>	Wilson <i>gw</i>	HC	
2.			AHS	
3.			AP	
4.				
5.				
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### I. Summary:

This bill creates a voluntary, statewide registry of individuals' health care advance directives and blood-types. The registry information may be displayed on an individual's driver's license or on a Florida identification card. The bill establishes a fee for persons participating in the health care advance directive and blood-type registry and establishes purposes for use of funds generated by the fee. The bill requires the Agency for Health Care Administration (AHCA or agency) and the Department of Highway Safety and Motor Vehicles (DHSMV or department) to develop and implement the registry and requires certain health care employees to confirm a principal's blood type. The Division of Driver Licenses offices must make forms available to the public and must make forms accessible electronically on the Internet.

The bill requires AHCA to provide funds for certain supplies and DHSMV to provide funds for a recordkeeping system. The bill requires DHSMV to collect data and provide collected data to AHCA for the registry. The bill provides access to the registry by certain persons and establishes guidelines for the processing of forms, and criteria for revocation or amendment of registry information. It will be the responsibility of the principal to update forms.

The bill provides immunity from civil liability and criminal prosecution for certain health care employees for acts performed in conjunction with certain information provided by DHSMV and provides immunity for AHCA, DHSMV, and their employees from criminal prosecution and civil liability for certain acts or forms. AHCA must develop, subject to the concurrence of DHSMV, a continuing education program relating to health care advance directives and the health care advance directive and blood-type registry. The bill requires the appointment of an education panel to create an end-of-life public education campaign, requires AHCA to conduct a study, and requires a report to the Legislature.

This bill amends ss. 322.051 and 322.08, F.S.

This bill creates ss. 320.08049, 765.3061, 765.3062, 765.3063, 765.3064, 765.3065, and 765.3066, F.S., and one unnumbered section of law.

## **II. Present Situation:**

### **Florida Drivers' Licenses and Identification Cards**

Chapter 320, F.S., establishes the requirements for motor vehicle licenses in the state. Section 320.08047, F.S., provides that, as a part of the collection process for license taxes, individuals must be permitted to make a voluntary contribution of \$1, for organ and tissues donor education and for maintaining the organ and tissue donor registry under ss. 765.521 and 765.5215, F.S.

Chapter 322, F.S., establishes the requirements for Florida drivers' licenses. Section 322.08, F.S., specifies the requirements for application for a Florida driver's license. The application form for a driver's license must include language permitting a voluntary \$1 per applicant contribution to be used for organ and tissue donor education and for maintaining the organ and tissue donor registry. Section 322.051, F.S., authorizes DHSMV to issue an identification card to any person who is 12 years of age or older, or any person who has a disability, regardless of age. This section requires any person who accepts a Florida driver's license as proof of identification to accept a Florida identification card as proof of identification when the bearer of the identification card does not also have a driver's license.

### **Florida's Health Care Advance Directive Statutes**

Chapter 765, F.S., governs health care advance directives, including living wills, life-prolonging procedures, organ donation, designation of a health care surrogate, pain management, and procedures to be followed in the absence of an advance directive. In 2002, Last Acts, an initiative supported by the Robert Wood Johnson Foundation to promote improvements in care at the end of life, rated Florida's advance directive statute as one of the best in the nation.<sup>1</sup> Seven states—Delaware, Florida, Hawaii, Maine, Maryland, Michigan, and New Mexico—were ranked at 4.5-5 on a scale that ranged from 0.5 to 5.0. States' policies, as established in law, were rated according to six criteria--five key elements of the Uniform Health Care Decisions Act<sup>2</sup>, as well as the existence of a state policy for Do Not Resuscitate (DNR) orders. Policies were rated according to whether they:

- Recommend a single, comprehensive advance directive, which reduces confusion.
- Avoid mandatory forms or language for medical powers of attorney or combined living wills/medical powers of attorney, giving residents the freedom to express their wishes in their own way.

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<sup>1</sup> *Means to a Better End: A Report on Dying in America Today*, Last Acts National Program Office, November 2002.

<sup>2</sup> The Uniform Law Commissioners approved the Uniform Health Care Decisions Act in 1993. [www.nccusl.org](http://www.nccusl.org).

- Give precedence to the agent's authority or most recent directive over the living will, recognizing that an agent has the advantage of being able to weigh all the facts and medical opinions in light of the patient's wishes at the time a decision needs to be made.
- Authorize default surrogates (typically next of kin) to make health care decisions, including decisions about life support if the patient has not named someone.
- Include "close friend" in the list of permissible default surrogates, recognizing that "family" in today's world often extends beyond the nuclear family.
- Have a statewide (non-hospital) DNR order protocol for emergency medical services personnel, to ensure that the wishes of terminally ill patients in the community can be followed by EMS personnel.

Under ch. 765, F.S., a person may express his or her wishes regarding medical treatment in the event that he or she experiences physical or mental incapacity through an *advance directive*, which is defined in s. 765.101, F.S., as "a witnessed written document or oral statement in which instructions are given by a principal or in which the principal's desires are expressed concerning any aspect of the principal's health care, and includes, but is not limited to, the designation of a health care surrogate, a living will, or an anatomical gift...."

### ***The Organ Donor Program***

Section 765.514, F.S., provides that an anatomical gift may be made by will or by another document signed by the donor in the presence of two witnesses. Under s. 765.521, F.S., AHCA and DHSMV are required to establish a program encouraging and allowing a person to make an anatomical gift as part of the process of issuing identification cards and issuing or renewing a driver's license. Currently, DHSDMV participates in the Organ Donor Program with AHCA. The department allows persons to make anatomical gifts as a part of the process of issuing identification cards and issuing and renewing driver licenses. The department provides an Organ Donor Will to customers to complete and the driver record is updated to reflect that the customer has made this designation. An identification card or driver's license is issued with the notation on the front of the card or license. If the customer requests that the Organ Donor Will be withdrawn at a later time, the department will update their file and issue them a duplicate identification card or driver license, at no fee, that does not reflect the Organ Donor designation. Organ donor wills are mailed to AHCA for the agency to maintain the completed forms. The Organ Donor Will form is available in all driver license offices and via the department's website.

According to AHCA, the present system is handicapped by out-of-date computer technology that, for example, cannot compensate for problems reading human handwriting on the donor wills. This results in as many as 30 percent of the hand signed donor wills in the system remaining unmatched by automated records at DHSMV. The organ donor registry requires additional resources not only to be an effective tool in the future but also to address problems in the current system.

### ***Blood Type Designation***

According to AHCA, currently accepted practice standards in blood banking do not condone the use of blood type documentation, such as would be found on a driver's license, in lieu of testing at the time of the need for transfusion. Laboratories performing such testing can only perform testing at the request of an authorized person, such as an allopathic or osteopathic physician.

***National Registries for Advance Directives***

National databases for health care advance directives include the North American Registry of Living Wills<sup>3</sup> and the U.S. Living Will Registry which may be contacted through toll-free telephone numbers or their websites. The U.S. Living Will Registry<sup>4</sup>, based in Westfield, NJ, represents on its website that individuals may register their advance directives and organ donation information with the Registry free of charge through a member health care provider or community partner, giving the registry permission to fax their document to any health care provider. Health care providers must join the Registry in order to use the automated retrieval system. The document will be transmitted only after the information is confirmed, which may take a day. The Registry says it is funded by health care providers who pay a fee to be able to access the registry's automated system. The Registry advertises that it provides a custom, state-specific system that would obviate the need for a state to create and operate its own system.

**III. Effect of Proposed Changes:**

**Section 1.** Creates s. 320.08049, F.S., to require that a person submitting an initial application form for participation in the health care advance directive and blood-type registry created under s. 765.3062, F.S., must be assessed a fee of \$10. The fee must be used by AHCA to establish and maintain the health care advance directive and blood-type registry. The bill specifies that funds received by AHCA from such fees must be used to:

- Obtain equipment and software to expand or improve the database for the registry and the organ donor program established under part V of ch. 765, F.S.;
- Employ persons necessary to ensure the proper operation of the equipment used to maintain the registry; and
- Fund health care advance directive education efforts as authorized in ss. 765.3065 and 765.3066, F.S.

**Section 2.** Amends s. 322.051, F.S., relating to identification cards issued by DHSMV, to require a fee of \$10 to be assessed for any person choosing to submit an initial application for an identification card indicating that he or she is participating in the health care advance directive and blood-type registry pursuant to s. 320.08049, F.S.

**Section 3.** Amends s. 322.08, F.S., relating to application for a driver's license, to require an assessment of a fee of \$10 for any person choosing to submit an initial application for an indication on his or her driver's license that he or she is participating in the health care advance directive and blood-type registry pursuant to s. 320.08049, F.S..

**Section 4.** Creates s. 765.3061, F.S., to require AHCA and DHSMV to develop and implement a program encouraging and allowing a person, at the person's request, to voluntarily make a health care advance directive, as well as to voluntarily provide his or her blood type, both of which may be noted on the person's driver's license or identification card, upon issuance or renewal of these documents.

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<sup>3</sup> <http://www.livingwill.com>

<sup>4</sup> <http://www.uslivingwillregistry.com>

The health care advance directive form and the blood-type confirmation form, both of which are to be distributed by the department, must be developed by the agency in consultation with the department. The health care advance directive form must include the living will specified in s. 765.303, F.S., which must be executed in accordance with s. 765.302, F.S. The blood-type confirmation form must be signed by a person's physician or an agent of a blood bank or laboratory that has documentation of the person's blood type. The health care advance directive and blood-type confirmation forms may require additional information and may include additional material as deemed necessary by the agency and the department.

An individual completing a health care advance directive form or a blood-type confirmation form shall have included on his or her driver's license or identification card a notation on the front of the card clearly indicating the individual's intent concerning life-prolonging procedures and the individual's blood type. A notation on an individual's driver's license or identification card that the individual has a health care advance directive or that provides the individual's blood type is sufficient to satisfy all requirements concerning life-prolonging procedures and necessary blood-type information for health care providers.

All forms relating to the execution, amendment, or revocation of a health care advance directive or blood-type confirmation for the purpose of participating in the registry must be made available to the public at all offices of the Division of Driver Licenses, as well as electronically on the Internet. The forms relating to the execution of a health care advance directive or confirmation of blood type, for purposes of participating in the registry, must:

- Require an express declaration that the principal has read the form and understands its contents.
- Require an express waiver of any privacy rights granted under state or federal law.
- Require an express waiver of liability for health care providers who rely upon the information contained on the principal's driver's license or the registry.
- Require an acknowledgment from the principal that it is the responsibility of the principal to submit an amendment form or revocation form to the Division of Driver Licenses if it is the principal's desire to change or remove any document recorded in the registry.
- Require acknowledgment from the principal that a reasonable delay will occur in the recording of a newly executed form in the registry by the agency and department, regardless of whether it is a health care advance directive or blood-type confirmation form, or any amendment or revocation thereof, and that health care providers will rely on the information in the registry available at the time such information is obtained by a health care provider.

AHCA must provide the necessary supplies and forms through funds appropriated from general revenue, any authorized fees, or contributions from interested, voluntary, nonprofit organizations. DHSMV must provide the necessary recordkeeping system through funds appropriated from general revenue.

**Section 5.** Creates s. 765.3062, F.S., to establish a health care advance directive and blood-type registry. This registry must be an expansion of the organ and tissue donor registry that is created, administered, and maintained in accordance with part V of ch. 765, F.S. The forms to be recorded in the registry must be collected by DHSMV and provided to AHCA in a manner similar to the forms and information collected for anatomical gifts as provided in part V of

ch. 765, F.S. The registry must record, through electronic means, health care advance directive and blood-type documents submitted through the driver's license identification program or obtained from other sources. The registry must be maintained in a manner that will allow, through electronic and telephonic methods, immediate access to health care advance directive and blood-type documents 24 hours a day, 7 days a week. Hospitals and other parties identified by rule of the agency must be allowed access, through coded means, to the information stored in the registry.

If a health care advance directive is made through the program established in this bill, the completed health care advance directive must be delivered to DHSMV and noted on an individual's driver's license. The bill specifies that delivery of the health care advance directive is not necessary for the validity of the health care advance directive. If a person amends or revokes a health care advance directive in accordance with s. 765.3063, F.S., the records of DHSMV must be updated to reflect such status of the health care advance directive.

If a health care advance directive is made by an individual, other than through the program established by AHCA and DHSMV, the document may be recorded in the registry administered by the agency and noted on an individual's driver's license, if the individual follows the procedure and the health care advance directive meets the criteria set forth in this chapter and in any rules of the department and the agency. AHCA and DHSMV must develop and implement a living will registry as an expansion and improvement of the organ donor database maintained by the agency.

**Section 6.** Creates s. 765.3063, F.S., to make the amendment to or revocation of a health care advance directive or removal of blood type from the registry the responsibility of the participant. A person may amend or revoke a health care advance directive by the execution and delivery of the appropriate form, signed and properly executed, to DHSMV to be transmitted to AHCA for recording in or removal from the registry.

If a person participates in the health care advance directive and blood-type registry, it is the responsibility of that person to complete and submit the appropriate forms needed to amend or revoke the health care advance directive or blood-type information. If a person chooses to participate in the registry, the most recently submitted forms recorded in the registry will be considered the controlling documents of the participant in any dispute or decision by a health care provider.

A person may remove the record of his or her blood type from the registry by signing a form provided by DHSMV, as developed in conjunction with AHCA, that is signed in the presence of an employee of the department.

The bill states that nothing in this section shall affect a principal's right to amend or revoke a health care advance directive or designation of a surrogate as authorized under s. 765.104 F.S., if the principal is not participating in the agency's health care advance directive and blood-type registry.

**Section 7.** Creates s. 765.3064, F.S., to provide that notwithstanding the express waiver of liability signed by the person who chooses to participate in the health care advance directive and

blood-type registry, a health care facility or a health care provider, or any other person acting under the direction of a health care facility or health care provider, carrying out a health care decision made in accordance with a properly recorded health care advance directive or blood-type confirmation transmitted by DHSMV, is not subject to criminal prosecution or civil liability and will not be deemed to have engaged in unprofessional conduct. AHCA and DHSMV and any employees acting within the scope of their employment are immune from criminal prosecution and civil liability for any acts or forms recorded in compliance with the provisions of ch. 765, F.S.

**Section 8.** Creates s. 765.3065, F.S., to require AHCA, subject to the concurrence of DHSMV, to develop a continuing education program to educate and inform health care professionals, including emergency medical personnel, law enforcement agencies and officers, state and local government employees, and the public regarding state laws relating to the health care advance directives and the health care advance directive and blood-type registry.

**Section 9.** Creates s. 765.3066, F.S., to create a health care advance directives education panel. The bill states the legislative finding that every competent adult has the fundamental right of self-determination regarding decisions pertaining to his or her health, including the right to choose or refuse medical treatment. The bill creates a panel of three members appointed by the Secretary of the Department of Elderly Affairs, the Secretary of Health Care Administration, and the Secretary of Health to create a campaign on end-of-life care for purposes of educating the public. This campaign must include culturally sensitive programs to improve understanding of end-of-life issues. Existing community resources, when available, must be used to support the program, and volunteers and health care professionals may assist in the program to the maximum extent possible. The program aimed at educating health care professionals may be implemented by contract with one or more medical schools located in the state.

**Section 10.** Requires AHCA to conduct a study of the implementation of the health care advance directive and blood-type registry and report its findings and recommendations to the Speaker of the House of Representatives and the President of the Senate by January 1, 2005. The study must, at a minimum, examine and make recommendations concerning the following:

- The nonrecurring capital outlay and recurring operational funding necessary to establish and maintain the health care advance directive and blood-type registry.
- The efficiency and cost-effectiveness of databases and procedures used to maintain the data in the registry and to transfer forms between DHSMV and AHCA.
- The reasonable timeframes necessary to record forms and other information in the registry and make such information available to health care facilities and appropriate professionals.
- The types of disclosures and disclaimers necessary to be included in the forms used for the health care advance directive and blood-type registry.
- The projected number of persons who may participate in the health care advance directive and blood-type registry and the sufficiency of the fees assessed to fund the registry and health care advance directive education efforts.

**Section 11.** Provides that the bill will take effect upon becoming a law.

**IV. Constitutional Issues:****A. Municipality/County Mandates Restrictions:**

The provisions of this bill have no impact on municipalities and the counties under the requirements of Article VII, Section 18 of the Florida Constitution.

**B. Public Records/Open Meetings Issues:**

The provisions of this bill have no impact on public records or open meetings issues under the requirements of Art. I, s. 24(a) and (b) of the Florida Constitution.

**C. Trust Funds Restrictions:**

The provisions of this bill have no impact on the trust fund restrictions under the requirements of Article III, Subsection 19(f) of the Florida Constitution.

**V. Economic Impact and Fiscal Note:****A. Tax/Fee Issues:**

Individuals wishing to participate in the registry would pay a \$10 fee to have their living will and or blood type included in the registry and noted on their driver's license or identification card.

**B. Private Sector Impact:**

Individuals wishing to participate in the registry would have to pay a \$10 fee to have their living will and or blood type included in the registry and noted on their driver's license or identification card.

**C. Government Sector Impact:****Cost to AHCA**

The creation of an advance directive and blood type registry with designation of the information on a driver's license or identification card, would require AHCA to restructure the existing organ donor registry. According to the agency, the computer hardware and software of the current registry is out-of-date. A major hardware purchase and software development would be needed to accommodate the advance directive/blood type registry. A mechanism to fund a health care advance directive registry would also offer the opportunity to update and streamline the organ donor registry. A totally web based system could be implemented that would allow individuals to file their advance health care directives with the registry without the intervention of AHCA or DHSMV.

Without substantive figures regarding the data storage size of the advance directive document and/or blood type document, AHCA cannot give an accurate description of the fiscal impact of the development and implementation on the agency. AHCA proposes that a thorough analysis of the requirements of this bill be conducted. Such a study would

encompass a system to host (1) both the existing organ donor wills and the proposed advance directive and blood-type wills; or (2) the proposed advance directive and blood-type wills only.

The cost of such a study is estimated at \$50,000 involving 500 consultant hours at \$100 per hour.

The deliverable of the proposed study will be a thorough scope and assessment of a system or systems to meet the requirements of this bill. Thereafter, using the content of this study report, AHCA will publish a request for proposals for the implementation of such system or systems.

On the basis of collecting responses to a request for proposals from vendors, AHCA will project a cost for the requirements of the bill to be delivered before the beginning of the 2005/2006 legislative session.

The continuing education program to educate and inform health care professionals, law enforcement agencies and officers, state and local government employees, and the public would have to be done with the concurrence of DHSMV. Review of the requirements for this education program would be considered in conjunction with the study of establishing the registry.

#### **Cost to DHSMV**

This bill would require 1,150 hours of contract programming at \$53.83 per hour to modify existing Driver Licensing Software Systems, for a cost of \$61,905.

#### **VI. Technical Deficiencies:**

None.

#### **VII. Related Issues:**

The ability of an individual to change a statement of intentions for health care as the condition of his or her health changes, and the ability of a surrogate to do so when the individual is no longer capable of expressing his or her intentions, is essential for an advance directive to truly enable an individual to have the health care he or she intends at the end of his or her life. In order for the statewide registry of advance directives to assist, rather than thwart, an individual's intentions, it would be necessary for a more recent directive given to the patient's physician in accordance with the provisions of chapter 765, F.S., to take precedence over the advance directive on file in the registry.

It is unclear how a person's intentions concerning life-prolonging procedures could be stated within the limited space available on a driver's license or identification card (p. 5, line 29 – p. 6, line 3). It is also not clear how simply stating on a person's driver's license or identification card that the person has an advance directive could satisfy all requirements concerning life-prolonging procedures for health care providers (p. 6, lines 3-8).

The requirement in s. 765.3061(3)(b)2., F.S., that the forms for participation in the registry must require an individual to waive all privacy rights granted under state or federal law is broader than would be necessary for the registry. The form should require a waiver of privacy rights for the purpose of allowing authorized individuals to access the advance directive or blood type documentation in the registry. However, a public records exemption would then be required.

The requirement in s. 765.3061(3)(b)3., F.S., that the forms for participation in the registry must require an individual to expressly waive liability for health care providers who rely upon the information on the principal's driver's license or in the registry could be challenged on the basis that the principal could not know in advance what health care providers might be relying on the information or under what circumstances the information would be used. The express waiver of liability for health care providers may be unenforceable.

The bill requires AHCA to conduct a study of the implementation of the health care advance directive and blood-type registry and report its findings and recommendations to the Speaker of the House of Representatives and the President of the Senate by January 1, 2005. The subjects specified for the study include the type of information that would be gathered before implementing such a registry. To conduct the study while simultaneously implementing the registry would deprive AHCA of the ability to use information from the study in setting up the registry.

If currently accepted practice standards in blood banking do not condone the use of blood type documentation, the provision of this bill requiring such a registry may have little practical application. In addition, it is not clear who would incur the cost of having the blood type tested.

In section 7, the bill creates s. 765.3064, F.S., to grant immunity from liability to a health care provider or other person acting under the direction of a health care provider carrying out a health care decision made in accordance with a properly recorded health care advance directive or blood-type confirmation transmitted by DHSMV. This section does not include a standard of good faith. To maintain consistency within ch. 765, F.S., this newly created section should have the same good faith standard as s. 765.109, F.S. As an alternative, if s. 765.109, F.S., were amended to provide immunity to a health care provider carrying out a health care decision made in accordance with a properly recorded health care advance directive or blood-type confirmation transmitted by DHSMV, there would be no need to create s. 765.3064, F.S.

#### **VIII. Amendments:**

None.

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This Senate staff analysis does not reflect the intent or official position of the bill's sponsor or the Florida Senate.

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Bill No. SB 2902

Amendment No. \_\_\_\_\_



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CHAMBER ACTION

Senate

House

**FAVORABLE**  
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Senator Jones moved the following amendment:

**Senate Amendment (with title amendment)**

On page 3, lines 25-27, delete those lines

and insert:

Section 1. Section 322.0812, Florida Statutes, is  
created to read:

322.0812 Additional fee imposed for persons

===== T I T L E A M E N D M E N T =====

And the title is amended as follows:

On page 1, line 4 delete that line

and insert:

s. 322.0812, F.S.; providing a fee for persons

Bill No. SB 2902

Amendment No. \_\_\_\_\_



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## CHAMBER ACTION

SenateHouseFAVORABLE  
4/12/04

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Senator Jones moved the following amendment:

**Senate Amendment**

On page 6, line 24, after the word "license"

insert: , identification card,

Bill No. SB 2902

Amendment No. \_\_\_\_\_



743692

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## CHAMBER ACTION

SenateHouse

**FAVORABLE**  
**4/12/04**

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Senator Jones moved the following amendment:

### Senate Amendment

On page 11, line 23, delete that line

and insert: study on how to implement the health care advance

Bill No. SB 2902

Amendment No. \_\_\_\_\_



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## CHAMBER ACTION

SenateHouseFAVORABLE  
4/12/04.  
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Senator Jones moved the following amendment:

**Senate Amendment**

On page 12, lines 17 and 18, delete those lines

and insert:

(6) The most effective and cost-efficient means to  
implement the educational requirements in ss. 765.3065 and  
765.3066.

Section 11. Unless otherwise expressly provided in  
this act, this act shall take effect on September 1, 2005.

Bill No. SB 2902

Amendment No. \_\_\_\_\_



281118

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CHAMBER ACTION

Senate

House

FAVORABLE  
4/12/04

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Senator Jones moved the following amendment:

**Senate Amendment (with title amendment)**

On page 12, between lines 16 and 17,

insert:

Section 11. Paragraph (1) of subsection (3) of section 395.1041, Florida Statutes, is amended to read:

395.1041 Access to emergency services and care.--

(3) EMERGENCY SERVICES; DISCRIMINATION; LIABILITY OF FACILITY OR HEALTH CARE PERSONNEL.--

(1) Hospital personnel must ~~may~~ withhold or withdraw cardiopulmonary resuscitation if presented with an order not to resuscitate executed pursuant to s. 401.45. Facility staff and facilities shall not be subject to criminal prosecution or civil liability, nor be considered to have engaged in negligent or unprofessional conduct, for withholding or withdrawing cardiopulmonary resuscitation pursuant to such an order. The absence of an order not to resuscitate executed pursuant to s. 401.45 does not preclude a physician from withholding or withdrawing cardiopulmonary resuscitation as

Bill No. SB 2902

Amendment No. \_\_\_\_



281118

1 otherwise permitted by law.

2 Section 12. Section 395.10411, Florida Statutes, is  
3 created to read:

4 395.10411 Duty of a facility to carry out the advance  
5 directive of a patient.--

6 (1) When a person who has a terminal condition or an  
7 end-stage condition or is in a persistent vegetative state and  
8 who has an advance directive is a patient in a facility  
9 licensed under this chapter which is providing health care  
10 services to the person, the facility must carry out the  
11 advance directive or must transfer the patient pursuant to s.  
12 765.1105 to a facility that will carry out the advance  
13 directive. The cost of transferring a patient for the purpose  
14 of carrying out an advance directive shall be paid by the  
15 facility from which the patient is transferred, and neither  
16 the patient nor the receiving facility is responsible for any  
17 part of such cost. A facility that fails to carry out a  
18 patient's advance directive will not receive payment of any  
19 state funds for life-prolonging treatment provided to the  
20 patient.

21 (2) When a person who has a terminal condition or an  
22 end-stage condition or is in a persistent vegetative state and  
23 who has an order not to resuscitate is a patient in a facility  
24 licensed under this chapter which is providing health care  
25 services to the person, the facility must carry out the order  
26 not to resuscitate. A facility that fails to carry out a  
27 patient's order not to resuscitate will not receive payment of  
28 any state funds for life-prolonging treatment provided to the  
29 patient.

30 (3) When a person who has a terminal condition or an  
31 end-stage condition or is in a persistent vegetative state and

Bill No. SB 2902

Amendment No. \_\_\_\_



281118

1 who has a living will is a designated organ donor, a health  
2 care facility may keep the organs of the person viable for a  
3 period not to exceed 36 hours once the decision has been made  
4 to remove life support. This subsection does not supersede an  
5 advance directive, and life-prolonging procedures may not be  
6 used beyond a period of 36 hours.

7 Section 13. Section 765.1105, Florida Statutes, is  
8 amended to read:

9 765.1105 Transfer of a patient.--

10 (1) A health care provider or facility that refuses to  
11 comply with a patient's advance directive, or the treatment  
12 decision of his or her surrogate, must ~~shall-make-reasonable~~  
13 ~~efforts-to~~ transfer the patient to another health care  
14 provider or facility that will comply with the directive or  
15 treatment decision. This chapter does not require a health  
16 care provider or facility to commit any act which is contrary  
17 to the provider's or facility's moral or ethical beliefs, if  
18 the patient:

19 (a) Is not in an emergency condition; and

20 (b) Has received written information upon admission  
21 informing the patient of the policies of the health care  
22 provider or facility regarding such moral or ethical beliefs.

23 (2) A health care provider or facility that is  
24 unwilling to carry out the wishes of the patient or the  
25 treatment decision of his or her surrogate because of moral or  
26 ethical beliefs must, within 48 hours after a determination by  
27 the attending physician that the patient's condition is such  
28 that the advance directive applies, 7-days either:

29 (a) Transfer the patient to another health care  
30 provider or facility. The health care provider or facility  
31 shall pay the costs for transporting the patient to another

Bill No. SB 2902

Amendment No. \_\_\_\_\_



281118

1 health care provider or facility; or

2 (b) If the patient has not been transferred, carry out  
3 the wishes of the patient or the patient's surrogate, unless  
4 the provisions of s. 765.105 apply.

5 Section 14. Section 765.1021, Florida Statutes, is  
6 created to read:

7 765.1021 Advance directive as part of a patient's  
8 medical record.--To encourage individuals to complete an  
9 advance directive and to inform individuals about options for  
10 care available to them at the end of life, the Legislature  
11 encourages primary physicians and patients to discuss advance  
12 directives and end-of-life care in a physician's office  
13 setting on a nonemergency basis. If a patient completes an  
14 advance directive and gives a copy of it to a physician, the  
15 patient's advance directive must become part of the patient's  
16 medical record.

17 Section 15. Subsection (1) of section 765.304, Florida  
18 Statutes, is amended to read:

19 765.304 Procedure for living will.--

20 (1) If a person has made a living will expressing his  
21 or her desires concerning life-prolonging procedures, but has  
22 not designated a surrogate to execute his or her wishes  
23 concerning life-prolonging procedures or designated a  
24 surrogate under part II, the attending physician must ~~may~~  
25 proceed as directed by the principal in the living will or  
26 must transfer him or her to a physician who will comply with  
27 the living will. In the event of a dispute or disagreement  
28 concerning the attending physician's decision to withhold or  
29 withdraw life-prolonging procedures, the attending physician  
30 shall not withhold or withdraw life-prolonging procedures  
31 pending review under s. 765.105. If a review of a disputed

Bill No. SB 2902

Amendment No. \_\_\_\_\_



281118

1 decision is not sought within 7 days following the attending  
 2 physician's decision to withhold or withdraw life-prolonging  
 3 procedures, the attending physician must ~~may~~ proceed in  
 4 accordance with the principal's instructions.

5  
 6 (Redesignate subsequent sections.)  
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9 ===== T I T L E    A M E N D M E N T =====

10 And the title is amended as follows:

11        On page 3, line 21, after the semicolon,

12  
 13 insert:

14        amending s. 395.1041, F.S.; requiring a  
 15        facility licensed under ch. 395, F.S., to  
 16        withhold or withdraw cardiopulmonary  
 17        resuscitation when presented with an order not  
 18        to resuscitate; creating s. 395.10411, F.S.;  
 19        providing requirements to be carried out by a  
 20        facility licensed under ch. 395, F.S., when a  
 21        patient has an advance directive, has an order  
 22        not to resuscitate, or is a designated organ  
 23        donor; amending s. 765.1105, F.S.; requiring a  
 24        health care provider that refuses to carry out  
 25        a patient's advance directive to transfer the  
 26        patient within a specified time to a health  
 27        care provider that will comply with the advance  
 28        directive; creating s. 765.1021, F.S.;  
 29        encouraging physicians and patients to discuss  
 30        end-of-life care; specifying when an advance  
 31        directive must be part of the patient's medical

Bill No. SB 2902

Amendment No. \_\_\_\_\_



281118

1 record; amending s. 765.304, F.S.; requiring an  
2 attending physician who refuses to comply with  
3 a person's living will to transfer the person  
4 to a physician who will comply;  
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Bill No. SB 2902

Amendment No. \_\_\_\_\_



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## CHAMBER ACTION

SenateHouseFAVORABLE  
4/12/04.  
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Senator Jones moved the following **amendment to amendment**  
(281118):

**Senate Amendment**

On page 2, line 30, through page 3, line 6, delete those  
lines

and insert: (3)When there is a plan to discuss termination of  
life support for a person who has a living will and is an  
organ donor, the health care facility must notify the  
federally designated organ procurement organization. This  
subsection does not supersede section 382.009.

# SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

BILL: SB 2948

SPONSOR: Senator Margolis

SUBJECT: Sovereign Immunity

DATE: April 7, 2004

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Munroe <i>sgm</i>	Wilson <i>gw</i>	HC	
2.			JU	
3.			AED	
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## I. Summary:

The bill provides that a not-for-profit college, university, or medical school that is accredited by an accrediting body recognized by Florida as a condition for licensure of its graduates is deemed a state agency, as defined in s. 768.28(2), F.S., for purposes of the sovereign immunity granted to state agencies by s. 768.28, F.S. The college, university, or medical school and its employees who provide patient services to publicly-funded patients in public hospitals or other health care facilities that are owned, used by, or under contract with a governmental entity, pursuant to an affiliation agreement or contract, have all the exemptions from civil liability which are granted to the State of Florida by s. 768.28, F.S.

The bill provides definitions. "Employee" includes a faculty member, practitioner, other health care professional, ancillary caregiver, or other employee that provides patient services. "Patient services" means comprehensive health care services and related administrative services; supervision of interns, residents, and fellows providing patient services; and participation in medical research protocols. "Public hospital" means a statutory teaching hospital or other health care facility that is owned, used by, or under contract by the State of Florida or a county, municipality, public authority, special taxing district with health care responsibilities, or other local government entity. "Publicly-funded patient" means a patient who is uninsured, underinsured, indigent, or insured through a government program, including, Medicaid, Medicare, Kidcare, or Healthy Kids, or whose medical expenses are not paid or reimbursed through private insurance or funds and who requires the expenditure of governmental funds to pay for any part of the medical services the patient receives.

This bill creates one undesignated section of law.

## II. Present Situation:

### Sovereign Immunity

Article X, s. 13, of the State Constitution, authorized the Florida Legislature in 1868 to waive sovereign immunity by stating that, “Provision may be made by general law for bringing suit against the state as to all liabilities now existing or hereafter originating.” The doctrine of sovereign immunity prohibits lawsuits in state court against a state government, and its agencies and subdivisions without the government’s consent. Section 768.28, F.S., provides that sovereign immunity for tort liability is waived for the state, and its agencies and subdivisions. As used in s. 768.28, F.S., “state agencies or subdivisions” include the executive departments, the Legislature, the judicial branch (including public defenders), and the independent establishments of the State of Florida, including state university boards of trustees; counties and municipalities; and corporations primarily acting as instrumentalities or agencies of the state, counties, or municipalities, including the Florida Space Authority.<sup>1</sup>

Section 768.28(5), F.S., imposes a \$100,000 limit on the government’s liability to a single person and for claims arising out of a single incident the limit is \$200,000. Section 768.28, F.S., outlines requirements for claimants alleging an injury by the state or its agencies. Section 11.066, F.S., requires a claimant to petition the Legislature in accordance with its rules, to seek an appropriation to enforce a judgment against the state or state agency. The exclusive remedy to enforce damage awards that exceed the recovery cap is by an act of the Legislature through the claims bill process. A claim bill is a bill that compensates an individual or entity for injuries or losses occasioned by the negligence or error of a public officer or agency.

The second form of sovereign immunity potentially available to private entities under contract with the government is set forth in s. 768.28(9), F.S. It states that agents of the state or its subdivisions are not personally liable in tort; instead, the government entity is held liable for its agent’s torts. The factors required to establish an agency relationship are: (1) acknowledgment by the principal that the agent will act for him; (2) the agent’s acceptance of the undertaking; and (3) control by the principal over the actions of the agent.<sup>2</sup> The existence of an agency relationship is generally a question of fact to be resolved by the fact-finder based on the facts and circumstances of a particular case. In the event, however, that the evidence of agency is susceptible of only one interpretation the court may decide the issue as a matter of law.<sup>3</sup>

Section 768.28(9), F.S., defines “officer, employee, or agent” to include, but not be limited to, any health care provider when providing services pursuant to s. 766.1115, F.S. (the Access to Health Care Act), any member of the Florida Health Services Corps, as defined in s. 381.0302, F.S., who provides uncompensated care to medically indigent persons referred by the Department of Health, and any public defender or her or his employee or agent, including among others, an assistant public defender and an investigator.

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<sup>1</sup> See s. 768.28(2), F.S.

<sup>2</sup> *Goldschmidt v. Holman*, 571 So.2d 422 (Fla. 1990).

<sup>3</sup> *Campbell v. Osmond*, 917 F. Supp. 1574, 1583 (M.D. Fla. 1996). See also *Stoll v. Noel*, 694 So.2d 701 (Fla. 1997).

### **State-supported Medical Schools, the University of Miami, and Jackson Memorial Hospital**

Jackson Memorial Hospital is an accredited, public, tertiary care hospital located in Miami. It is the major teaching facility for the University of Miami School of Medicine. With 1,567 licensed beds, Jackson Memorial Hospital's many roles in South Florida include being the only full-service provider for the indigent and medically indigent of Miami-Dade County, a regional referral center, and a magnet for medical research and innovation. Based on the number of admissions to a single facility, Jackson Memorial is one of the nation's busiest hospitals. Jackson Memorial Hospital's trauma facilities form the only adult and pediatric Level 1 Trauma Center in South Florida. This center serves as a regional trauma center resource, one of the busiest such providers in the nation. Jackson Memorial is operated by the Public Health Trust for Miami-Dade County.<sup>4</sup>

The University of Miami is a private university located in Miami. While Jackson Memorial Hospital, as a public hospital, currently is protected under sovereign immunity, the university and its professors are not. The University of Miami School of Medicine is the teaching affiliate with Jackson Memorial Hospital.

State-supported medical schools throughout the state are affiliated with teaching hospitals or medical centers. Tampa General is a private, not-for-profit hospital, whose primary teaching affiliate is the University of South Florida College of Medicine; Shands hospitals' primary teaching affiliate is the University of Florida College of Medicine; Orlando Regional Medical Center's primary affiliate is the University of Florida College of Medicine; and Mt. Sinai Hospital has teaching affiliations with both the University of Miami and the University of South Florida. Lake Erie College of Osteopathic Medicine is scheduled to begin operating in Bradenton during the Fall, 2004.

The State Board of Education is authorized to secure, or otherwise provide as a self-insurer, or by a combination thereof, comprehensive general liability insurance including professional liability for health care and veterinary sciences, for:

- The State Board of Education and its officers and members.
- A university board of trustees and its officers and members.
- The faculty and other employees and agents of a university board of trustees.
- The students of a state university.
- A state university or any college, school, institute, center, or program thereof.
- Any not-for-profit corporation organized pursuant to chapter 617, F.S., and the directors, officers, employees, and agents thereof, which is affiliated with a state university, if the corporation is operated for the benefit of the state university in a manner consistent with the best interests of the state, and if such participation is approved by a self-insurance program council, the university president, and the board of trustees.<sup>5</sup>

Any self-insurance program established under s. 1004.24, F.S., must report to the Office of Insurance Regulation any claim or action for damages for personal injuries claimed to have been

<sup>4</sup> See <<http://um-jmh.org/JHS/Jackson.html>>.

<sup>5</sup> See s. 1004.24, F.S.

caused by error, omission, or negligence in the performance of professional services provided by the state university board of trustees through an employee or agent of the state university board of trustees, including medical physicians, osteopathic physicians, physician assistants, podiatric physicians, and dentists. Such reported claims or actions shall include those which are based on a claimed performance of professional services without consent if the claim resulted in a final judgment in any amount, or a settlement in any amount. The self-insurance reports made to the Office of Insurance Regulation must contain specified information, including the name, address, and specialty of the employee or agent of the state university board of trustees whose performance or professional services is alleged in the claim or action to have caused personal injury.<sup>6</sup>

State universities or medical schools currently enjoy sovereign immunity under s. 768.28, F.S. No self-insurance program adopted by the State Board of Education may sue or be sued. The claim files of such self-insurance programs are privileged and confidential under the Public Records Law, and are only for the use of the program in fulfilling its duties. The University of Florida and the University of South Florida have their own medical malpractice (self-insurance) funds or coverage. The Florida State University College of Medicine provides students with the skills, knowledge, and values needed to practice medicine by developing partnerships with other health care organizations. The Florida State University Board of Trustees is authorized to negotiate and purchase policies of insurance to indemnify from any liability those individuals or entities providing sponsorship or training to the students of the medical school, professionals employed by the medical school, and students of the medical school.<sup>7</sup>

### **III. Effect of Proposed Changes:**

The bill provides that a not-for-profit college, university, or medical school that is accredited by an accrediting body recognized by Florida as a condition for licensure of its graduates is deemed a state agency, as defined in s. 768.28(2), F.S., for purposes of the sovereign immunity granted to state agencies by s. 768.28, F.S. The college, university, or medical school and its employees who provide patient services to publicly-funded patients in public hospitals or other health care facilities that are owned, used by, or under contract with a governmental entity, pursuant to an affiliation agreement or contract, have all the exemptions from civil liability which are granted to the State of Florida by s. 768.28, F.S.

The bill provides definitions. “Employee” includes a faculty member, practitioner, other health care professional, ancillary caregiver, or other employee that provides patient services. “Patient services” means comprehensive health care services and related administrative services; supervision of interns, residents, and fellows providing patient services; and participation in medical research protocols. “Public hospital” means a statutory teaching hospital or other health care facility that is owned, used by, or under contract by the State of Florida or a county, municipality, public authority, special taxing district with health care responsibilities, or other local government entity. “Publicly-funded patient” means a patient who is uninsured, underinsured, indigent, or insured through a government program, including, Medicaid, Medicare, Kidcare, or Healthy Kids, or whose medical expenses are not paid or reimbursed

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<sup>6</sup> See s. 627.912(5), F.S.

<sup>7</sup> See s. 1004.42(14), F.S.

through private insurance or funds and who requires the expenditure of governmental funds to pay for any part of the medical services the patient receives.

The bill takes effect on July 1, 2004.

#### **IV. Constitutional Issues:**

##### **A. Municipality/County Mandates Restrictions:**

The provisions of this bill have no impact on municipalities and the counties under the requirements of Article VII, s. 18 of the Florida Constitution.

##### **B. Public Records/Open Meetings Issues:**

Although the bill provides that a not-for-profit college, university, or medical school that is accredited by an accrediting body recognized by Florida as a condition for licensure of its graduates is deemed a state agency, as defined in s. 768.28(2), F.S., for purposes of the sovereign immunity granted to state agencies by s. 768.28, F.S., such college, university, or medical school will not be a state agency for purposes of the Public Records and Meeting Laws.

##### **C. Trust Funds Restrictions:**

The provisions of this bill have no impact on the trust fund restrictions under the requirements of Article III, Subsection 19(f) of the Florida Constitution.

#### **V. Economic Impact and Fiscal Note:**

##### **A. Tax/Fee Issues:**

None.

##### **B. Private Sector Impact:**

This bill limits economic damages recoverable by certain individuals in the private sector who have suffered damages in tort.

##### **C. Government Sector Impact:**

The passage of the bill would extend the waiver of sovereign immunity to certain colleges, universities, or medical schools and their employees who provide patient services to publicly-funded patients in public hospitals or other health care facilities that are owned, used by, or under a contract with a governmental entity, pursuant to an affiliation agreement or contract. Although it would be difficult to quantify a specific fiscal impact, the passage of the bill will result in lower insurance costs and some costs to the entities deemed as state agencies for claim bills that may be considered by the Legislature, for payment of amounts in excess of the statutory caps in s. 768.28, F.S.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

Under the bill, a not-for-profit college, university, or medical school and its employees who provide patient services to publicly-funded patients in public hospitals *or other health care facilities* that are owned, *used by*, or under contract with a governmental entity, pursuant to an affiliation agreement or contract, have all the exemptions from civil liability which are granted to the State of Florida by s. 768.28, F.S. It is unclear what “used by” means in the context of the exemption from civil liability extended under the bill.

The bill defines “public hospital” to mean a statutory teaching hospital or other health care facility that is owned, *used by*, or *under contract* by the State of Florida or a county, municipality, public authority, special taxing district with health care responsibilities, or other local government entity. The definition of “public hospital” may be interpreted to cover a broad number of entities that provide health care which are used by or under contract with specified governmental entities.

“Publicly-funded patient” is defined in the bill to mean a patient who is uninsured, underinsured, indigent, or insured through a government program, including, Medicaid, Medicare, Kidcare, or Healthy Kids, or whose medical expenses are not paid or reimbursed through private insurance or funds and who requires the expenditure of governmental funds to pay for any part of the medical services the patient receives. In effect, the sovereign immunity extended to a college, university, or medical school and its employees is limited to torts suffered by publicly-funded patients in public hospitals *or other health care facilities* and will not be limited to only publicly-funded patients who are unable to fully pay their medical bills without any governmental assistance.

The bill provides that a not-for-profit college, university, or medical school that is accredited by an accrediting body recognized by Florida as a condition for licensure of its graduates is deemed a state agency, as defined in s. 768.28(2), F.S., for purposes of the sovereign immunity granted to state agencies by s. 768.28, F.S. In effect, this extends sovereign immunity to all not-for-profit colleges, universities, or medical schools that are accredited by an accrediting body recognized by Florida as a condition for licensure of their graduates. There does not appear to be a nexus required for an agency relationship to exist or a state public purpose for such an extension of the waiver of sovereign immunity to such entities. The requirements recognized to establish an agency relationship for purposes of sovereign immunity are: (1) acknowledgment by the principal that the agent will act for him; (2) the agent's acceptance of the undertaking; and (3) control by the principal over the actions of the agent.<sup>8</sup> The existence of an agency relationship is generally a question of fact to be resolved by the fact-finder based on the facts and circumstances of a particular case. In the event, however, that the evidence of agency is susceptible of only one interpretation the court may decide the issue as a matter of law.<sup>9</sup>

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<sup>8</sup> *Goldschmidt v. Holman*, 571 So.2d 422 (Fla. 1990).

<sup>9</sup> *Campbell v. Osmond*, 917 F. Supp. 1574, 1583 (M.D. Fla. 1996). See also *Stoll v. Noel*, 694 So.2d 701 (Fla. 1997).

The bill extends a waiver of sovereign immunity to certain employees of a not-for-profit college, university, or medical school who provide patient services to publicly-funded patients. The bill does not require such claims or actions to be reported to the Office of Insurance Regulation.

**VIII. Amendments:**

None.

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This Senate staff analysis does not reflect the intent or official position of the bill's sponsor or the Florida Senate.

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Bill No. SB 2948

Amendment No. \_\_\_\_\_



780184

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## CHAMBER ACTION

SenateHouseFAVORABLE  
4/12/04.  
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Senator Wilson moved the following amendment:

**Senate Amendment**

On page 1, lines 13-25, delete those lines

and insert:

Section 1. (1) A not-for-profit college, university, or medical school that provides patient services to publicly funded patients in public hospitals or other health care facilities that are owned, used by, or under contract with a governmental entity pursuant to an affiliation agreement or contract is deemed a state agency while acting within the scope of and pursuant to guidelines established in such contract, as defined in section 768.28(1), Florida Statutes, for purposes of the sovereign immunity granted to state agencies by that section and shall have all the exemptions from civil liability which are granted to the state by section 768.28, Florida Statutes, while providing such patient services to publicly funded patients as described in this section.

Bill No. SB 2948

Amendment No. \_\_\_\_\_



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Senate

CHAMBER ACTION

HouseFAVORABLE  
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Senator Wilson moved the following **amendment to amendment**  
(780184) :

**Senate Amendment**On page 1, line 24, delete "768.28(1)"and insert: 768.28(2)

Bill No. SB 2948

Amendment No. \_\_\_\_\_



800214

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## CHAMBER ACTION

SenateHouseFAVORABLE  
4/12/04.  
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Senator Wilson moved the following amendment:

**Senate Amendment**On page 2, line 2, following the word "and"insert: access to

Bill No. SB 2948Amendment No.       

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FAVORABLE  
4/12/04Senate

CHAMBER ACTION

House.  
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Senator Wilson moved the following amendment:

**Senate Amendment**

On page 2, line 14, before the period

insert: ; however, the term does not include an employee of a  
local, state, or county government by virtue of insurance  
received as an employee benefit

Bill No. SB 2948

Amendment No. \_\_\_\_\_



354176

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## CHAMBER ACTION

SenateHouseFAVORABLE  
4/12/04.  
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Senator Wilson moved the following amendment:

**Senate Amendment**

On page 2, between lines 14 and 15,

insert:

(e) "Not-for-profit college, university, or medical school" means a not-for-profit college, university, or medical school that is accredited by an accrediting body recognized by this state as a condition for licensure of its graduates, and the term includes the trustees and employees of such institution.

# SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

BILL: PCS/SB 2948

SPONSOR: Health, Aging, and Long-Term Care Committee and Senator Margolis

SUBJECT: Sovereign Immunity

DATE: April 16, 2004

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Munroe <i>Bjm</i>	Wilson <i>W</i>	HC	
2.			JU	
3.			AED	
4.			AP	
5.				
6.				

## I. Summary:

The bill specifies legislative findings and intent regarding the extension of sovereign immunity to certain colleges, universities, and their medical schools and the employees or agents of those colleges or universities that provide health care services to publicly funded patients at public general hospitals.

The bill provides that a not-for-profit college or university or its medical school that provides health care services to publicly funded patients in a public general hospital pursuant to an affiliation agreement or contract is deemed an agent of the governmental agency while providing such health care services for purposes of s. 768.28, F.S., and shall have all the exemptions from civil liability which are granted to the State of Florida by s. 768.28, F.S. An employee or agent of a not-for-profit college or university or its medical school may not be held personally liable in tort or named as a party defendant in any action arising from the provision of any health care services to publicly funded patients of a public general hospital, except as provided in s. 768.28(9)(a), F.S., which does not extend sovereign immunity to an officer, employee, or agent acting outside the course and scope of his or her employment or acting in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property. The records of a not-for-profit college or university or its medical school relating to health care services for publicly funded patients treated at a public general hospital are subject to disclosure in accordance with applicable law.

The bill amends s. 768.28, F.S., relating to sovereign immunity to revise the definition of "officer, employee, or agent" to include any not-for-profit college or university or its medical school that enters into an affiliation agreement or contract to allow its employees to provide health care services to publicly funded patients treated at a public general hospital. "Public general hospital" means a general hospital, as defined in s. 395.002, F.S., and is located in a

county defined in s. 125.011(1), F.S.<sup>1</sup>, which is owned, governed, operated, or maintained by a governmental entity. Currently, only Miami-Dade County qualifies under this definition. The term also includes other health care facilities that are under contract with the public general hospital to its publicly funded patients. “Health care services” means:

- Any comprehensive health care services as defined in s. 641.19(4), F.S.,<sup>2</sup> including administrative services, which are provided to publicly funded patients of a public general hospital;
- The supervision of interns, residents, and fellows providing any health care services to publicly funded patients of a public hospital; and
- The provision of access to participation in medical research protocols.

“Publicly funded patient” means a patient who is uninsured, underinsured, indigent, or insured through a government program, including Medicaid, Medicare, Kidcare, or Healthy Kids, or whose medical expenses are not paid or reimbursed through private insurance or funds and who requires the expenditure of governmental funds to pay for any part of the medical services the patient receives. However, the term does not include employees of the federal government, or a state, local, or county government by virtue of insurance received as an employee benefit. “Not-for-profit college or university or its medical school” means a not-for-profit college or university or its medical school that is accredited by an accrediting body recognized by Florida as a condition of licensure of its graduates, and includes the trustees and employees of such institution.

The bill requires such not-for-profit college or university or its medical school to report to the Office of Insurance Regulation any claim or action for damages for personal injuries claimed to have been caused by error, omission, or negligence in performance of professional services of a medical physician, osteopathic physician, podiatrist, or dentist as an employee or agent of the college or university.

This bill amends sections 627.912 and 768.28, Florida Statutes.

This bill creates one undesignated section of law.

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<sup>1</sup> Section 125.011(1), F.S., provides that “county” means any county operating under a home rule charter adopted pursuant to ss. 10, 11, and 24, Art. VIII of the Constitution of 1885, as preserved by Art. VIII, s. 6(e) of the Constitution of 1968, which county, by resolution of its board of county commissioners, elects to exercise the powers herein conferred.

<sup>2</sup> Section 641.19(4) F.S., defines “comprehensive health care services” to mean services, medical equipment, and supplies furnished by a provider, which may include, but which are not limited to, medical, surgical, and dental care; psychological, optometric, optic, chiropractic, podiatric, nursing, physical therapy, and pharmaceutical services; health education, preventive medical, rehabilitative, and home health services; inpatient and outpatient hospital services; extended care; nursing home care; convalescent institutional care; technical and professional clinical pathology laboratory services; laboratory and ambulance services; appliances, drugs, medicines, and supplies; and any other care, service, or treatment of disease, or correction of defects for human beings.

## II. Present Situation:

### Sovereign Immunity

Article X, s. 13, of the State Constitution, authorized the Florida Legislature in 1868 to waive sovereign immunity by stating that, “Provision may be made by general law for bringing suit against the state as to all liabilities now existing or hereafter originating.” The doctrine of sovereign immunity prohibits lawsuits in state court against a state government, and its agencies and subdivisions without the government’s consent. Section 768.28, F.S., provides that sovereign immunity for tort liability is waived for the state, and its agencies and subdivisions. As used in s. 768.28, F.S., “state agencies or subdivisions” include the executive departments, the Legislature, the judicial branch (including public defenders), and the independent establishments of the State of Florida, including state university boards of trustees; counties and municipalities; and corporations primarily acting as instrumentalities or agencies of the state, counties, or municipalities, including the Florida Space Authority.<sup>3</sup>

Section 768.28(5), F.S., imposes a \$100,000 limit on the government’s liability to a single person and for claims arising out of a single incident the limit is \$200,000. Section 768.28, F.S., outlines requirements for claimants alleging an injury by the state or its agencies. Section 11.066, F.S., requires a claimant to petition the Legislature in accordance with its rules, to seek an appropriation to enforce a judgment against the state or state agency. The exclusive remedy to enforce damage awards that exceed the recovery cap is by an act of the Legislature through the claims bill process. A claim bill is a bill that compensates an individual or entity for injuries or losses occasioned by the negligence or error of a public officer or agency.

The second form of sovereign immunity potentially available to private entities under contract with the government is set forth in s. 768.28(9), F.S. It states that agents of the state or its subdivisions are not personally liable in tort; instead, the government entity is held liable for its agent’s torts. The factors required to establish an agency relationship are: (1) acknowledgment by the principal that the agent will act for him; (2) the agent’s acceptance of the undertaking; and (3) control by the principal over the actions of the agent.<sup>4</sup> The existence of an agency relationship is generally a question of fact to be resolved by the fact-finder based on the facts and circumstances of a particular case. In the event, however, that the evidence of agency is susceptible of only one interpretation the court may decide the issue as a matter of law.<sup>5</sup>

Section 768.28(9), F.S., defines “officer, employee, or agent” to include, but not be limited to, any health care provider when providing services pursuant to s. 766.1115, F.S. (the Access to Health Care Act), any member of the Florida Health Services Corps, as defined in s. 381.0302, F.S., who provides uncompensated care to medically indigent persons referred by the Department of Health, and any public defender or her or his employee or agent, including among others, an assistant public defender and an investigator. Under s. 768.28(9)(a), F.S., the exclusive remedy for injury or damage suffered as a result of an act, event, or omission of an officer, employee, or agent of the state or any of its subdivisions or constitutional officers shall be by action against the governmental entity, or the head of such entity in her or his official capacity,

<sup>3</sup> See s. 768.28(2), F.S.

<sup>4</sup> *Goldschmidt v. Holman*, 571 So.2d 422 (Fla. 1990).

<sup>5</sup> *Campbell v. Osmond*, 917 F. Supp. 1574, 1583 (M.D. Fla. 1996). See also *Stoll v. Noel*, 694 So.2d 701 (Fla. 1997).

or the constitutional employee, unless such act or omission was committed in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property. Under s. 768.28(9)(a), F.S., the state or its subdivisions shall not be liable in tort for the acts or omissions of an officer, employee, or agent committed while acting outside the course and scope of her or his employment or committed in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property.

### **State-supported Medical Schools, the University of Miami, and Jackson Memorial Hospital**

Jackson Memorial Hospital is an accredited, public, tertiary care hospital located in Miami. It is the major teaching facility for the University of Miami School of Medicine. With 1,567 licensed beds, Jackson Memorial Hospital's many roles in South Florida include being the only full-service provider for the indigent and medically indigent of Miami-Dade County, a regional referral center, and a magnet for medical research and innovation. Based on the number of admissions to a single facility, Jackson Memorial is one of the nation's busiest hospitals. Jackson Memorial Hospital's trauma facilities form the only adult and pediatric Level 1 Trauma Center in South Florida. This center serves as a regional trauma center resource, one of the busiest such providers in the nation. Jackson Memorial is operated by the Public Health Trust for Miami-Dade County.<sup>6</sup>

The University of Miami is a private university located in Miami. While Jackson Memorial Hospital, as a public hospital, currently is protected under sovereign immunity, the university and its professors are not. The University of Miami School of Medicine is the teaching affiliate with Jackson Memorial Hospital.

State-supported medical schools throughout the state are affiliated with teaching hospitals or medical centers. Tampa General is a private, not-for-profit hospital, whose primary teaching affiliate is the University of South Florida College of Medicine; Shands hospitals' primary teaching affiliate is the University of Florida College of Medicine; Orlando Regional Medical Center's primary affiliate is the University of Florida College of Medicine; and Mt. Sinai Hospital has teaching affiliations with both the University of Miami and the University of South Florida. Lake Erie College of Osteopathic Medicine is scheduled to begin operating in Bradenton during the fall, 2004.

The State Board of Education is authorized to secure, or otherwise provide as a self-insurer, or by a combination thereof, comprehensive general liability insurance including professional liability for health care and veterinary sciences, for:

- The State Board of Education and its officers and members.
- A university board of trustees and its officers and members.
- The faculty and other employees and agents of a university board of trustees.
- The students of a state university.
- A state university or any college, school, institute, center, or program thereof.

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<sup>6</sup> See <<http://um-jmh.org/JHS/Jackson.html>>.

- Any not-for-profit corporation organized pursuant to chapter 617, F.S., and the directors, officers, employees, and agents thereof, which is affiliated with a state university, if the corporation is operated for the benefit of the state university in a manner consistent with the best interests of the state, and if such participation is approved by a self-insurance program council, the university president, and the board of trustees.<sup>7</sup>

Any self-insurance program established under s. 1004.24, F.S., must report to the Office of Insurance Regulation any claim or action for damages for personal injuries claimed to have been caused by error, omission, or negligence in the performance of professional services provided by the state university board of trustees through an employee or agent of the state university board of trustees, including medical physicians, osteopathic physicians, physician assistants, podiatric physicians, and dentists. Such reported claims or actions shall include those which are based on a claimed performance of professional services without consent if the claim resulted in a final judgment in any amount, or a settlement in any amount. The self-insurance reports made to the Office of Insurance Regulation must contain specified information, including the name, address, and specialty of the employee or agent of the state university board of trustees whose performance or professional services is alleged in the claim or action to have caused personal injury.<sup>8</sup>

State universities or medical schools currently enjoy sovereign immunity under s. 768.28, F.S. No self-insurance program adopted by the State Board of Education may sue or be sued. The claim files of such self-insurance programs are privileged and confidential under the Public Records Law, and are only for the use of the program in fulfilling its duties. The University of Florida and the University of South Florida have their own medical malpractice (self-insurance) funds or coverage. The Florida State University College of Medicine provides students with the skills, knowledge, and values needed to practice medicine by developing partnerships with other health care organizations. The Florida State University Board of Trustees is authorized to negotiate and purchase policies of insurance to indemnify from any liability those individuals or entities providing sponsorship or training to the students of the medical school, professionals employed by the medical school, and students of the medical school.<sup>9</sup>

### **County and Municipal Governments**

The Florida Constitution grants local governments broad home rule authority. Specifically, non-charter county governments may exercise those powers of self-government that are provided by general or special law.<sup>10</sup> Those counties operating under a county charter have all powers of self-government not inconsistent with general law, or special law approved by the vote of the electors.<sup>11</sup> Section 125.01, F.S., enumerates the powers and duties of county government, unless preempted on a particular subject by general or special law. Those powers include the provision of fire protection, ambulance services, parks and recreation, libraries, museums and other cultural facilities, waste and sewage collection and disposal, and water and alternative water supplies. Municipalities have those governmental, corporate, and proprietary powers that enable

<sup>7</sup> See s. 1004.24, F.S.

<sup>8</sup> See s. 627.912(5), F.S.

<sup>9</sup> See s. 1004.42(14), F.S.

<sup>10</sup> Art. VIII, § 1(f), Fla. Const.

<sup>11</sup> Art. VIII, § 1(g), Fla. Const.

them to conduct municipal government, perform its functions and provide services, and exercise any power for municipal purposes except as otherwise provided by law.<sup>12</sup> Section 125.011(1), F.S., provides that “county” means any county operating under a home rule charter adopted pursuant to ss. 10, 11, and 24, Article VIII of the Constitution of 1885, as preserved by Article VIII, s. 6(e) of the Constitution of 1968, which county, by resolution of its board of county commissioners, elects to exercise the powers herein conferred. Currently, only Miami-Dade County qualifies under this definition.

Sections 125.60-125.64, F.S., provide procedures for the adoption of a county charter. These provisions allow for a charter commission to conduct a comprehensive study of the operation of county government and of the ways it could be improved or reorganized. Following the commission’s submission of a charter to the board of county commissioners, the board shall call a special election within a specified time frame to determine whether the proposed charter is adopted. Alternatively, the board of county commissioners may propose by ordinance a charter that is consistent with Part IV of chapter 125, F.S., and the “Optional Charter County Law.” Under this law, s. 125.86, F.S., specifies the powers and duties of the charter county, which include all powers of local self-government “not inconsistent with general law as recognized by the Constitution and laws of the state and which have not been limited by the charter.”

### III. Effect of Proposed Changes:

**Section 1.** Provides legislative findings and intent regarding the extension of sovereign immunity to certain colleges, universities, and their medical schools that provide health care services to publicly funded patients at public general hospitals. The Legislature finds that:

- Access to quality, affordable health care for all residents of Florida is a necessary goal for the state and that public general hospitals play an essential role in providing access to health care services.
- Access to quality health care is enhanced when public general hospitals affiliate and coordinate their common endeavors with medical schools. Such affiliations are an integral part of the delivery of health care services to patients of public general hospitals by offering quality graduate medical education programs to resident physicians who provide health care services at public general hospitals. These affiliations ensure continued access to quality health care services for Florida residents and therefore should be encouraged in order to maintain and expand such services.
- When a medical school affiliates or enters into a contract with a public general hospital to provide health care services to publicly funded patients of the public general hospital, the medical school greatly increases its exposure to claims arising out of alleged medical malpractice because the medical school does not have the same level of protection against liability claims as a governmental entity providing the same health care services to the same patients of the public general hospital.
- The high cost of litigation, unequal exposure, and increased medical malpractice insurance premiums have adversely impacted the ability of certain medical schools to permit their employees to provide health care services to patients of public general hospitals. Failure to

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<sup>12</sup> Art. VIII, § 2(b), Fla. Const.

take corrective action will lead to a reduction of health care services by such medical schools in public general hospitals.

- The public is better served and will benefit from corrective action to address the concerns specified in the bill. It is imperative that the Legislature further the public benefit by conferring sovereign immunity upon colleges, universities, medical schools, and their employees when, pursuant to an affiliation agreement or a contract to provide health care services, they provide health care services to publicly funded patients of a public general hospital.

The bill expresses legislative intent that each college and university that affiliates or enters into a contract with a public general hospital and the employees of such college and university who provide health care in that hospital be granted sovereign immunity protection under s. 768.28, F.S., in the same manner and to the same extent as the state and its agencies and political subdivisions when providing health care services to publicly funded patients in a public general hospital. The employee of such college and university shall not be held personally liable in tort or named as a party defendant in an action while performing health care services, except as provided in s. 768.28(9)(a), F.S.

**Section 2.** Amends s. 627.912, F.S., relating to professional liability claims and actions and reports by insurers, to require any not-for-profit college or university or its medical school that provides health care services to publicly funded patients at a public general hospital in any county as defined in s. 125.011(1), F.S. to report to the Office of Insurance Regulation any claim or action for damages for personal injuries claimed to have been caused by error, omission, or negligence in performance of professional services of a medical physician, osteopathic physician, podiatrist, or dentist as an employee or agent of the college or university. There is a technical glitch in the reporting requirements in current law; a statutory cross-reference to the information that must be reported to the Office of Insurance Regulation is corrected.<sup>13</sup>

**Section 3.** Amends s. 768.28, F.S., relating to sovereign immunity to revise the definition of “officer, employee, or agent” to include any not-for-profit college or university or its medical school that enters into an affiliation agreement or contract to allow its employees to provide health care services to publicly funded patients treated at a public general hospital. “Public general hospital” means a general hospital, as defined in s. 395.002, F.S.,<sup>14</sup> and is located in a county defined in s. 125.011(1), F.S., which is owned, governed, operated, or maintained by a governmental entity. The term also includes other health care facilities that are under contract with the public general hospital to treat its publicly funded patients. “Health care services” means:

<sup>13</sup> Section 627.912(5), F.S., as created by s. 34, ch. 98-141, Laws of Florida, requires reports to contain the information required in subsection (3) of s. 627.912, F.S., and the correct reference should be subsection (2) of that section.

<sup>14</sup> Section 395.002, F.S., defines “general hospital” to include any facility which offers services more intensive than those required for room, board, personal services, and general nursing care, and offers facilities and beds for use beyond 24 hours by individuals requiring diagnosis, treatment, or care for illness, injury, deformity, infirmity, abnormality, disease, or pregnancy. Such hospital regularly makes available at least clinical laboratory services, diagnostic X-ray services, and treatment facilities for surgery or obstetrical care, or other definitive medical treatment of similar extent and regularly makes its facilities and services available to the general population.

- Any comprehensive health care services as defined in s. 641.19(4), F.S., including administrative services, which are provided to publicly funded patients of a public general hospital;
- The supervision of interns, residents, and fellows providing any health care services to publicly funded patients of a public hospital; and
- The provision of access to participation in medical research protocols.

“Publicly funded patient” means a patient who is uninsured, underinsured, indigent, or insured through a government program, including Medicaid, Medicare, Kidcare, or Healthy Kids, or whose medical expenses are not paid or reimbursed through private insurance or funds and who requires the expenditure of governmental funds to pay for any part of the medical services the patient receives. However, the term does not include employees of the federal government, or a state, local, or county government by virtue of insurance received as an employee benefit. “Not-for-profit college or university or its medical school” means a not-for-profit college or university or its medical school that is accredited by an accrediting body recognized by Florida as a condition of licensure of its graduates, and includes the trustees and employees of such institution.

The bill provides that a not-for-profit college or university or its medical school that provides health care services to publicly funded patients in a public general hospital pursuant to an affiliation agreement or contract is deemed an agent of the governmental agency while providing such health care services for purposes of s. 768.28, F.S., and shall have all the exemptions from civil liability which are granted to the State of Florida by s. 768.28, F.S. An employee or agent of a not-for-profit college or university or its medical school may not be held personally liable in tort or named as a party defendant in any action arising from the provision of any health care services to publicly funded patients of a public general hospital, except as provided in s. 768.28(9)(a), F.S., which does not extend sovereign immunity to an officer, employee, or agent acting outside the course and scope of his or her employment or acting in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property. The records of a not-for-profit college or university or its medical school relating to health care services for publicly funded patients treated at a public general hospital are subject to disclosure in accordance with applicable law.

**Section 4.** Provides an effective date of July 1, 2004.

#### **IV. Constitutional Issues:**

##### **A. Municipality/County Mandates Restrictions:**

The provisions of this bill have no impact on municipalities and the counties under the requirements of Article VII, s. 18 of the Florida Constitution.

##### **B. Public Records/Open Meetings Issues:**

Although the bill provides that a not-for-profit college, university, or medical school that is accredited by an accrediting body recognized by Florida as a condition for licensure of its graduates is deemed a state agency, as defined in s. 768.28(2), F.S., for purposes of the

sovereign immunity granted to state agencies by s. 768.28, F.S., such college, university, or medical school will not be a state agency for purposes of the Public Records and Meetings Laws.

**C. Trust Funds Restrictions:**

The provisions of this bill have no impact on the trust fund restrictions under the requirements of Article III, Subsection 19(f) of the Florida Constitution.

**V. Economic Impact and Fiscal Note:**

**A. Tax/Fee Issues:**

None.

**B. Private Sector Impact:**

This bill limits economic damages recoverable by certain individuals in the private sector who have suffered damages in tort.

**C. Government Sector Impact:**

The passage of the bill would extend sovereign immunity and the limited waiver of sovereign immunity to certain colleges, universities, or medical schools and their employees who provide health care services to publicly-funded patients in a public general hospital which is located in any county as defined in s. 125.011(1), F.S., pursuant to an affiliation agreement or contract. Although it would be difficult to quantify a specific fiscal impact, the passage of the bill will result in lower insurance costs and some costs to the entities deemed as state agencies for claim bills that may be considered by the Legislature, for payment of amounts in excess of the statutory caps in s. 768.28, F.S.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Amendments:**

None.

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This Senate staff analysis does not reflect the intent or official position of the bill's sponsor or the Florida Senate.

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STATEMENT OF SUBSTANTIAL CHANGES CONTAINED IN  
\*\*PROPOSED\*\* COMMITTEE SUBSTITUTE FOR  
Senate Bill 2948

The proposed committee substitute narrows the extension of sovereign immunity to certain colleges, universities, and their medical schools and the employees or agents of those colleges or universities that provide health care services to publicly funded patients at public general hospitals. The bill provides legislative findings and intent regarding the extension of sovereign immunity to certain colleges, universities, and their medical schools and the employees or agents of those colleges or universities that provide health care services to publicly funded patients at public general hospitals. The bill requires the reporting of specified professional liability claims of any not-for-profit college or university or its medical school that provides health care services to publicly funded patients at a public general hospital in any county as defined in s. 125.011(1), F.S., to the Office of Insurance Regulation.

Committee on Health, Aging, and Long-Term Care

Staff Director *John Wilson*

(FILE TWO COPIES WITH THE SECRETARY OF THE SENATE)

1                   A bill to be entitled  
2           An act relating to sovereign immunity;  
3           providing legislative findings and intent;  
4           amending s. 627.912, F.S.; requiring certain  
5           colleges, universities, and their medical  
6           schools to report any personal injury claims  
7           involving certain employees who are licensed  
8           health care practitioners to the Office of  
9           Insurance Regulation; amending s. 768.28, F.S.;  
10          expanding a definition to include certain  
11          health care providers; including under  
12          sovereign immunity protection, certain  
13          colleges, universities, and medical schools  
14          providing health care services to publicly  
15          funded patients at public general hospitals in  
16          any county as defined in s. 125.011(1), F.S.;  
17          providing definitions; providing an exception;  
18          providing for the disclosure of public records;  
19          providing an effective date.

20  
21   Be It Enacted by the Legislature of the State of Florida:

22  
23           Section 1. Legislative findings and intent.--

24           (1) The Legislature finds that access to quality,  
25           affordable health care for all residents of this state is a  
26           necessary goal for the state and that public general hospitals  
27           play an essential role in providing access to health care  
28           services.

29           (2) The Legislature further finds that access to  
30           quality health care is enhanced when public general hospitals  
31           affiliate and coordinate their common endeavors with medical

1 schools. Such affiliations are an integral part of the  
2 delivery of health care services to patients of public general  
3 hospitals by offering quality graduate medical education  
4 programs to resident physicians who provide health care  
5 services at public general hospitals. These affiliations  
6 ensure continued access to quality health care services for  
7 residents of this state and therefore should be encouraged in  
8 order to maintain and expand such services.

9 (3) The Legislature finds that when a medical school  
10 affiliates or enters into a contract with a public general  
11 hospital to provide health care services to publicly funded  
12 patients of the public general hospital, the medical school  
13 greatly increases its exposure to claims arising out of  
14 alleged medical malpractice because the medical school does  
15 not have the same level of protection against liability claims  
16 as a governmental entity providing the same health care  
17 services to the same patients of the public general hospital.

18 (4) The Legislature finds that the high cost of  
19 litigation, unequal liability exposure, and increased medical  
20 malpractice insurance premiums have adversely impacted the  
21 ability of certain medical schools to permit their employees  
22 to provide health care services to patients of public general  
23 hospitals. Failure to take corrective action will lead to a  
24 reduction of health care services by such medical schools in  
25 public general hospitals.

26 (5) The Legislature finds that the public is better  
27 served and will benefit from corrective action to address the  
28 concerns specified in this section. It is imperative that the  
29 Legislature further the public benefit by conferring sovereign  
30 immunity upon colleges, universities, medical schools, and  
31 their employees when, pursuant to an affiliation agreement or

1 a contract to provide health care services, they provide  
2 health care services to publicly funded patients of a public  
3 general hospital.

4 (6) It is the intent of the Legislature that each  
5 college and university that affiliates or enters into a  
6 contract with a public general hospital be granted sovereign  
7 immunity protection under section 768.28, Florida Statutes, in  
8 the same manner and to the same extent as the state and its  
9 agencies and political subdivisions when providing health care  
10 services to publicly funded patients in a public general  
11 hospital. It is also the intent of the Legislature that  
12 employees of a college or university who provide health care  
13 services to publicly funded patients of a public general  
14 hospital be immune from lawsuits in the same manner and to the  
15 same extent as employees and agents of the state and its  
16 agencies and political subdivisions when providing health care  
17 services, and further, that they not be held personally liable  
18 in tort or named as a party defendant in an action while  
19 performing health care services, except as provided in section  
20 768.28(9)(a), Florida Statutes.

21 Section 2. Subsection (5) of section 627.912, Florida  
22 Statutes, is amended and subsection (2) of that section is  
23 reenacted, to read:

24 627.912 Professional liability claims and actions;  
25 reports by insurers and health care providers; annual report  
26 by office.--

27 (2) The reports required by subsection (1) shall  
28 contain:

29 (a) The name, address, health care provider  
30 professional license number, and specialty coverage of the  
31 insured.

1 (b) The insured's policy number.

2 (c) The date of the occurrence which created the  
3 claim.

4 (d) The date the claim was reported to the insurer or  
5 self-insurer.

6 (e) The name and address of the injured person. This  
7 information is confidential and exempt from the provisions of  
8 s. 119.07(1), and must not be disclosed by the office without  
9 the injured person's consent, except for disclosure by the  
10 office to the Department of Health. This information may be  
11 used by the office for purposes of identifying multiple or  
12 duplicate claims arising out of the same occurrence.

13 (f) The date of suit, if filed.

14 (g) The injured person's age and sex.

15 (h) The total number, names, and health care provider  
16 professional license numbers of all defendants involved in the  
17 claim.

18 (i) The date and amount of judgment or settlement, if  
19 any, including the itemization of the verdict.

20 (j) In the case of a settlement, such information as  
21 the office may require with regard to the injured person's  
22 incurred and anticipated medical expense, wage loss, and other  
23 expenses.

24 (k) The loss adjustment expense paid to defense  
25 counsel, and all other allocated loss adjustment expense paid.

26 (l) The date and reason for final disposition, if no  
27 judgment or settlement.

28 (m) A summary of the occurrence which created the  
29 claim, which shall include:

30 1. The name of the institution, if any, and the  
31 location within the institution at which the injury occurred.

1           2. The final diagnosis for which treatment was sought  
2 or rendered, including the patient's actual condition.

3           3. A description of the misdiagnosis made, if any, of  
4 the patient's actual condition.

5           4. The operation, diagnostic, or treatment procedure  
6 causing the injury.

7           5. A description of the principal injury giving rise  
8 to the claim.

9           6. The safety management steps that have been taken by  
10 the insured to make similar occurrences or injuries less  
11 likely in the future.

12           (n) Any other information required by the commission,  
13 by rule, to assist the office in its analysis and evaluation  
14 of the nature, causes, location, cost, and damages involved in  
15 professional liability cases.

16           (5) Any self-insurance program established under s.  
17 1004.24, and any not-for-profit college or university or its  
18 medical school that provides health care services to publicly  
19 funded patients at a public general hospital in any county as  
20 defined in s. 125.011(1), shall report to the office any claim  
21 or action for damages for personal injuries claimed to have  
22 been caused by error, omission, or negligence in the  
23 performance of professional services provided by the state  
24 university board of trustees through an employee or agent of  
25 the state university board of trustees, including  
26 practitioners of medicine licensed under chapter 458,  
27 practitioners of osteopathic medicine licensed under chapter  
28 459, podiatric physicians licensed under chapter 461, and  
29 dentists licensed under chapter 466, or based on a claimed  
30 performance of professional services without consent if the  
31 claim resulted in a final judgment in any amount, or a

1 settlement in any amount. The reports required by this  
2 subsection shall contain the information required by  
3 subsection (2) ~~(3)~~ and the name, address, and specialty of the  
4 employee or agent of the state university board of trustees  
5 whose performance or professional services is alleged in the  
6 claim or action to have caused personal injury.

7 Section 3. Paragraph (b) of subsection (9) of section  
8 768.28, Florida Statutes, is amended and paragraph (f) is  
9 added to subsection (10) of that section, to read:

10 768.28 Waiver of sovereign immunity in tort actions;  
11 recovery limits; limitation on attorney fees; statute of  
12 limitations; exclusions; indemnification; risk management  
13 programs.--

14 (9)

15 (b) As used in this subsection, the term:

16 1. "Employee" includes any volunteer firefighter.

17 2. "Officer, employee, or agent" includes, but is not  
18 limited to:

19 a. Any health care provider when providing services  
20 pursuant to s. 766.1115;

21 b. Any member of the Florida Health Services Corps, as  
22 defined in s. 381.0302, who provides uncompensated care to  
23 medically indigent persons referred by the Department of  
24 Health; ~~and~~

25 c. Any public defender or her or his employee or  
26 agent, including, among others, an assistant public defender  
27 and an investigator; ~~and~~

28 d. (I) Any not-for-profit college or university or its  
29 medical school that enters into an affiliation agreement or  
30 contract to allow its employees to provide health care  
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1 services to publicly funded patients treated at a public  
2 general hospital under paragraph (10) (f).

3 (II) Any faculty member, or other health care  
4 professional, practitioner, ancillary caregiver, or employee,  
5 of a not-for-profit college or university or its medical  
6 school that enters into an affiliation agreement or a contract  
7 to provide health care services in a public general hospital,  
8 and who provides such services to publicly funded patients of  
9 the public general hospital under paragraph (10) (f).

10 (10)

11 (f)1. A not-for-profit college or university or its  
12 medical school that provides health care services to publicly  
13 funded patients in a public general hospital pursuant to an  
14 affiliation agreement or contract is deemed an agent of the  
15 governmental agency while providing such health care services  
16 for purposes of this section, and shall have all the  
17 exemptions from civil liability which are granted to the state  
18 by this section.

19 2. For purposes of this paragraph, the term:

20 a. "Public general hospital" means a general hospital,  
21 as defined in s. 395.002 and located in a county as defined in  
22 s. 125.011(1), which is owned, governed, operated, or  
23 maintained by a governmental entity. The term also includes  
24 other health care facilities that are under contract with the  
25 public general hospital to treat its publicly funded patients.

26 b. "Health care services" mean:

27 (I) Any comprehensive health care services as defined  
28 in s. 641.19(4), including related administrative services,  
29 which are provided to publicly funded patients of a public  
30 general hospital;

1        (II) The supervision of interns, residents, and  
2 fellows providing any health care services to publicly funded  
3 patients of a public hospital; and

4        (III) The provision of access to participation in  
5 medical research protocols.

6        c. "Publicly funded patient" means a patient who is  
7 uninsured, underinsured, indigent, or insured through a  
8 government program, including Medicaid, Medicare, KidCare, or  
9 Healthy Kids, or whose medical expenses are not paid or  
10 reimbursed through private insurance or funds and who requires  
11 the expenditure of governmental funds to pay for any part of  
12 the medical services the patient receives. However, the term  
13 does not include employees of the federal government or a  
14 state, local, or county government by virtue of insurance  
15 received as an employee benefit.

16        d. "Not-for-profit college or university or its  
17 medical school" means a not-for-profit college or university  
18 or its medical school that is accredited by an accrediting  
19 body recognized by this state as a condition for licensure of  
20 its graduates, and includes the trustees and employees of such  
21 institution.

22        3. An employee or agent of a not-for-profit college or  
23 university or its medical school may not be held personally  
24 liable in tort or named as a party defendant in any action  
25 arising from the provision of any health care services to  
26 publicly funded patients of a public general hospital, except  
27 as provided in paragraph (9) (a).

28        4. The records of a not-for-profit college or  
29 university or its medical school relating to health care  
30 services for publicly funded patients treated at a public  
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1 general hospital are subject to disclosure in accordance with  
2 applicable law.

3       Section 4. This act shall take effect July 1, 2004.  
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# SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

BILL: SB 1454

SPONSOR: Senator Bennett

SUBJECT: Nurse Registries

DATE: April 15, 2004

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Parham <i>PP</i>	Wilson <i>W</i>	HC	
2.			AHS	
3.			AP	
4.			RC	
5.				
6.				

## I. Summary:

This bill deletes a requirement that a registered nurse monthly visit the home of each individual who is attended by a certified nursing assistant or home health aide referred by a nurse registry, in order to assess the patient's medical condition and the quality of care that is being provided to the patient. The bill also deletes the requirement that the nurse report to the attending physician and the nurse registry any condition which, in the professional judgment of the nurse, requires further medical attention.

This bill repeals s. 400.506(10)(c), Florida Statutes.

## II. Present Situation:

A nurse registry is a business that offers contracts for registered nurses, licensed practical nurses, home health aides, CNAs, homemakers, and companions. These persons work as independent contractors and provide services to patients in their homes or private duty and staffing services in health care facilities. A nurse registry cannot have any employees except for the administrator and office staff – all workers must be independent contractors. Nurse registries provide nursing care services, but they are not licensed to provide physical therapy or other therapy services or medical equipment services. Specifically, nurse registry services are limited to:

- Nursing care provided by licensed registered nurses or licensed practical nurses;
- Care and services provided by certified nursing assistants or home health aides; or
- Homemaker or companion services provided pursuant to s. 400.509, F.S.

A nurse registry does not qualify for Medicare and Medicaid reimbursements.

The Agency for Health Care Administration (AHCA) licenses nurse registries. Licenses are issued for a one-year period. The number of nurse registries has grown from 65 in 2000 to 178 as of January 26, 2004, a 163.5 percent increase, and it is anticipated by AHCA that the trend toward more applications for nurse registries will continue.

Persons who receive care from a home health aide or a CNA must have a physician and the physician must be notified within 48 hours after the contract for care is completed. A registered nurse must make a monthly visit to each patient who receives services from a home health aide or a CNA to assess the quality of care provided as required in s. 400.506(10)(c), F.S. The home health agency statutes do not require this same amount of supervision for similar care.

Section 400.505(10)(c), F.S., further requires the nurse to report to the attending physician and nurse registry any condition which, in the professional judgment of the nurse, requires further medical attention. The assessment must become part of the patient's file with the nurse registry and may be reviewed by AHCA during the survey process.

### **III. Effect of Proposed Changes:**

**Section 1.** Repeals s. 400.506 (10)(c), F.S., deleting the requirement that a registered nurse monthly visit the home of each individual who is attended by a certified nursing assistant or home health aide referred by a nurse registry, in order to assess the patient's medical condition and the quality of care that is being provided to the patient. The provisions requiring specified reports and recordkeeping relating to the assessments by registered nurses are also deleted.

**Section 2.** Provides that the act shall take effect July 1, 2004.

### **IV. Constitutional Issues:**

#### **A. Municipality/County Mandates Restrictions:**

The provisions of this bill have no impact on municipalities and the counties under the requirements of Article VII, s. 18 of the Florida Constitution.

#### **B. Public Records/Open Meetings Issues:**

The provisions of this bill have no impact on public records or open meetings issues under the requirements of Article I, s. 24(a) and (b) of the Florida Constitution.

#### **C. Trust Funds Restrictions:**

The provisions of this bill have no impact on the trust fund restrictions under the requirements of Article III, s. 19(f) of the Florida Constitution.

### **V. Economic Impact and Fiscal Note:**

#### **A. Tax/Fee Issues:**

None.

**B. Private Sector Impact:**

Eliminating the requirement that a registered nurse make a monthly visit to every patient that has a home health aide or CNA will benefit the nurse registry. The nurse registry will not have to contract with a registered nurse to perform the monthly assessments.

Persons receiving services through the nurse registry will not have to pay the extra cost of a monthly registered nurse visit in addition to what they are paying for the home health aide or CNA.

**C. Government Sector Impact:**

None.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

Under section 400.506(10)(b), F.S., a CNA or home health aide is limited to assisting a patient with bathing, dressing, toileting, grooming, eating, physical transfer, and those normal daily routines the patient could perform if he or she were physically capable. According to AHCA, it is unnecessary for an individual who needs only the type of non-skilled services delivered by a CNA or home health aide to be required to have monthly visits by a registered nurse.

**VIII. Amendments:**

None.

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This Senate staff analysis does not reflect the intent or official position of the bill's sponsor or the Florida Senate.

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# SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

BILL: CS/CS/SB 2262

SPONSOR: Education Committee, Children and Families Committee, and Senators Smith, Cowin, and Wise

SUBJECT: Prescription of Psychotropic Medications to Dependent Minors

DATE: April 15, 2004

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Collins	Whiddon	CF	Fav/CS
2.	Dormady	O'Farrell	ED	Fav/CS
3.	Parham <i>LP</i>	Wilson <i>W</i>	HC	
4.			AED	
5.			AP	
6.				

## I. Summary:

CS/CS/SB 2262 creates the Center for Juvenile Psychotropic Studies within the Department of Psychiatry in the College of Medicine at the University of Florida. The purpose of this center is to collect, track, and assess information regarding dependent minors in state custody who have been or are currently being prescribed psychotropic medications. The bill provides for the appointment of a director for the center, creates an advisory board, and specifies the membership of the board.

The center is directed to work with the Department of Children and Family Services (DCF), the Department of Juvenile Justice (DJJ), and the Agency for Health Care Administration (AHCA) to collect specific information relating to children in the custody of the state who are receiving or have received psychotropic medications. The bill also directs DCF, DJJ, and AHCA to provide client information to the center, in accordance with state and federal privacy laws.

The center is required to provide a report to the Legislature regarding the treatment of dependent minors with psychotropic medications by January 1, 2005. The provisions of this section of the bill are repealed on July 1, 2005.

The bill also sets forth requirements regarding the provision of medication to children taken into protective custody, in child care settings, and public schools. The bill prohibits a child from being taken into custody due to a parent's refusal to administer psychotropic medications unless such refusal caused the child's neglect or abuse. The bill establishes requirements for obtaining parental authorization to administer medications to children in child care programs, with criminal penalties created for violations of these requirements. The bill also specifies that school personnel are prohibited from recommending the use of psychotropic medications for students.

The bill amends ss. 39.401, 743.0645, and 1006.062, Florida Statutes.

The bill creates s. 402.3127, Florida Statutes.

## **II. Present Situation:**

### **Prevalence of Mental Health Disorders Among Youth**

A substantial number of children in the U.S. have diagnosed mental disorders. A recent study reported that a review of Medicaid prescription records (from unidentified states) during 1995 indicated that 150,000 preschoolers under the age of six were prescribed psychotropic medications.<sup>1</sup> Additionally, the 1999 MECA Study (Methodology for Epidemiology of Mental Disorders in Children and Adolescents) estimated that almost 21 percent of children in the U.S. between the ages of nine and 17 had a diagnosable mental or addictive disorder that caused impairment, and 11 percent of these children (approximately 4 million) had a significant impairment that limited their ability to function. Primary care physicians identify approximately 19 percent of the children they see as having behavioral and emotional problems. A number of treatment options are available to address mental health problems in children including psychotropic medications.

### **Use of Psychotropic Medication on Children**

Psychotropic medication is one of many treatment interventions that may be used to address mental health problems. Medication may be recommended and prescribed for children with mental, behavioral, or emotional symptoms when the potential benefits of treatment outweigh the risks. There has been growing public concern, however, over reports that very young children are being prescribed psychotropic medications with potentially adverse side effects.

The National Institute of Mental Health reports that psychotropic medications, while generally not the first option, may be prescribed when the possible benefits of the medications outweigh the risk and, in particular, when psychosocial interventions are not effective by themselves and there are potentially serious negative consequences for the child. There are several major categories of psychotropic medications: stimulants, antidepressants, anti-anxiety agents, anti-psychotics, and mood stabilizers. These medications may be used to treat a variety of symptoms, including:

- Stimulant medications are frequently used for Attention Deficit Hyperactivity Disorder (ADHD), which is the most common behavioral disorder of childhood;
- Anti-depressants and anti-anxiety medications are frequently used for depression, anxiety, and obsessive compulsive disorders;
- Anti-psychotic medications are used to treat children with schizophrenia, bipolar disorders, autism, and severe conduct disorders; and
- Mood stabilizing medications are used to treat bipolar disorders.

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<sup>1</sup> Zito, J.A., Safer, D.J., dosReis, S., Gardner, J.F., Boles, M., and Lynch, F., 2000. "Trends in the Prescribing of Psychotropic Medications to Preschoolers." *The Journal of the American Medical Association*. 283 (8).

The use of psychotropic medication by children has been a source of recent public controversy with many concerned that prescription psychotropic medications are overused and misapplied to children with mental health problems. Little information exists to help clarify the debate concerning national patterns of psychotropic medication use by children and adolescents. In a study examining two nationally representative datasets to track changes in the use of prescription psychotropic medication by children and adolescents over a span of 10 years (1987 to 1996), researchers found that the overall rate of any psychotropic medication use increased from 1.4 to 3.9 per 100 children and adolescents, with increases evident across all geographic regions and all age, race/ethnicity, sex, and insurance groups examined. After controlling for these demographic characteristics, the researchers found that the likelihood of using a psychotropic medication was nearly three times higher in 1996 than in 1987.<sup>2</sup>

Some of the concern regarding the use of psychotropic medications with children stems from the limited information that is available regarding the efficacy and the potential side effects of these drugs with children. Most clinical trials for these drugs were conducted on an adult population. The same results are not always obtained when these drugs are used with children, and the side effects for children are frequently different from those experienced by adults. The Food and Drug Administration (FDA) has publicly expressed concerns regarding the use of antidepressants in children and recently established an advisory committee to further study and evaluate the use of psychotropic medications with children.

### **Use of Psychotropic Medication on Children in State Custody**

A trend that has begun in juvenile detention systems is the number of juveniles who require mental health services. Estimates of the prevalence of emotional, behavioral, and mental disorders among children in state custody (e.g. children in foster care or in juvenile justice facilities) are even higher than among youth in the general population.

Despite the growing concern, there is a dearth of adequate research on the prevalence and types of mental health disorders among youth in the juvenile justice system. A comprehensive review of the research literature<sup>3</sup> found the research to be scarce and methodologically flawed. Other reviews have reached similar conclusions.<sup>4</sup> While little data is presently available on children with emotional disorders in the justice system, it has been estimated that up to 60 percent of youth who are involved in the system suffer with such disorders.

Although mental health professionals posit that a significant percentage of youth involved in the juvenile justice system have unmet needs for mental health and substance abuse services, few empirical data exist to support this contention. The Northwestern Juvenile Project is addressing this issue. Beginning in 1995, researchers examined mental disorders among 1,830 delinquent youth (1,172 males and 658 females) held in the Cook County (Chicago, IL) Juvenile Temporary

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<sup>2</sup> Olfson, M., Marcus, S. C., Weissman, M. M., & Jensen, P. S. 2002. "National trends in the use of psychotropic medications by children." *Journal of the American Academy of Child and Adolescent Psychiatry*. 41(5), 514-521.

<sup>3</sup> Otto, R.K., Greenstein, J.J., Johnson, M.K., and Friedman, R.M. 1992. "Prevalence of mental disorders among youth in the juvenile justice system." In *Responding to the Mental Health Needs of Youth in the Juvenile Justice System*, edited by J.J. Cocozza. Seattle, WA: The National Coalition for the Mentally Ill in the Criminal Justice System, pp. 7-48.

<sup>4</sup> Wierson, M., Forehand, R.L., and Frame, C.L. 1992. "Epidemiology and the treatment of mental health problems in juvenile delinquents." *Advances in Behavior Residential Theory*. 14:93-120.

Detention Center. A longitudinal component to this study of delinquent youth was added in November 1998, funded by the Office of Juvenile Justice and Delinquency Prevention (OJJDP) at the U.S. Department of Justice, other Federal agencies, and private foundations. Preliminary data from the baseline study of juvenile detainees show that two-thirds of the youth have one or more mental disorders. Females have far greater mental health needs and greater risk factors than males. Preliminary data suggest that, nationwide, more than 670,000 youth processed in the juvenile justice system each year would meet diagnostic criteria for one or more mental disorders that require mental health and/or substance abuse treatment.<sup>5</sup>

In Florida, there has been controversy around the number of children in the custody of the state who are on psychotropic medications. The controversy has included concern over the types of medications prescribed, the circumstances under which the drugs were used, how consent was obtained, and the lack of oversight provided by state agencies in the prescription and use of these medications. No source of information currently exists, however, to accurately depict the prescribing patterns and frequency with which these medications are provided to children under state custody or the appropriate use of these drugs.

### **Child Protection**

Chapter 39, F.S., provides the statutory framework for addressing child abuse, neglect, and abandonment. Child abuse under chapter 39, F.S., is defined as a willful or threatened act that results in physical, mental, or sexual injury to a child or results in harm that causes or is likely to cause the child's physical, mental, or emotional health to be significantly impaired [s. 39.01(2), F.S.]. Child neglect is the deprivation of basic necessities such as food, shelter, clothing, or medical treatment that can cause, or places, the child in danger of significant impairment to his or her physical, mental, or emotional health [s. 39.01(45), F.S.]. Procedures for DCF which guide the identification of child abuse, neglect, and abandonment identify an allegation of deprivation of medical treatment as medical neglect (CF Operating Procedures No. 175-28). This type of allegation can include that the parent has not sought medical attention for an illness or injury or is not following through with the medical treatment prescribed for an illness or injury. Pursuant to statute and the operating procedures, the lack of provision of the medical treatment is not in and of itself medical neglect but instead the neglect occurs when not providing the medical treatment results, or could result, in serious or long-term harm to the child.

Section 39.401, F.S., stipulates those conditions under which a child may be removed from the home and taken into the custody of DCF. Specifically, the child may be taken into the custody of DCF only under the following conditions:

- The child has been abused, neglected, or abandoned;
- The child is experiencing an illness or injury, or is in imminent danger of such illness or injury, that resulted from abuse, neglect, or abandonment;
- The parent or legal guardian has violated a court imposed condition of placement; or
- A parent, legal custodian, or responsible adult relative is not immediately known and available to care for the child.

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<sup>5</sup> Office of Juvenile Justice and Delinquency Prevention. 2001. Fact Sheet. Assessing Alcohol, Drug, and Mental Disorders in Juvenile Detainees.

## **Child Care**

The intent of child care regulation in most states is to protect the health, safety, and well-being of the children. Basic health and safety regulations usually include the administration of medication. The National Health and Safety Performance Standards published by the American Public Health Association and the American Academy of Pediatrics include standards that recommend the limitation of administration of medications at child care facilities to prescription medications ordered by a health care provider for a specific child, with written permission of the parent or legal guardian, and to nonprescription medications recommended by a health care provider for a specific child or for a specific circumstance for any child in the facility, again with written permission of the parent or legal guardian. It is also recommended that facilities have standards for labeling and storing medications, training caregivers to administer medication, and maintaining written records on the administration of medications.

In Florida, licensing requirements for child care facilities, family day care homes, large family child care homes, and specialized child care facilities for the care of mildly ill children include standards for dispensing, storing, and maintaining records relative to medications (Chapters 65C-20, 65C-22, and 65C-25, F.A.C.). Basically, the standards require the prescription and non-prescription medications provided by the parents be in the original containers. Written authorization is required to dispense any non-prescription medication. Prescription medication is to be dispensed according to the label directions.

Public school and nonpublic school child care programs that are deemed to be child care pursuant to s. 402.3025, F.S., must comply with these child care licensing standards. These deemed public school and nonpublic school child care programs include those not operated or staffed directly by the public schools, those serving children under 3 years of age who are not eligible for the special education programs (P.L. No 94-142 or P.L. No. 99-457), and programs in private schools serving children between the ages of 3 and 5 years when a majority of children in the school are under 5 years of age. The administration of medication in child care programs operated and staffed by the school system is governed by s. 1006.062, F.S., and local school board policy. Section 1006.062, F.S., requires written authorization from the parents for the dispensing of prescription medications. Each school board is required to adopt policies and procedures for the administration of prescription medications and to provide training to school personnel in the administration of prescription medication.

## **Statutory Sanctions for Misuse of Medications with Children**

Sanctions are available through Florida law to respond to the harm that can be caused by misuse of medications including licensing sanctions, the child protection laws, and criminal penalties. First, s. 402.310, F.S., provides for sanctions for violating child care licensing standards, specifically imposing administrative fines and denial, suspension, or revocation of the license. Given the current statutory construction of these provisions, administrative fines are the primary sanction applied for violation of the requirements for administering medications. These child care licensing standards and, in turn, the sanctions, currently do not apply to family day care homes that are not required or choose not to be licensed, to certain programs in public and nonpublic schools deemed not to be child care pursuant to s. 402.3025, F.S., to religious exempt

child care programs pursuant to s. 402.316, F.S., and to summer camps and child care services in transient establishments pursuant to s. 402.302(2), F.S.

Second, inappropriate administration of medication could also be considered child abuse if harm is caused by the misuse of the medications. All child care programs with the exception of those programs in the public schools and nonpublic schools deemed not to be child care pursuant to s. 402.3025, F.S., would fall under the jurisdiction of Florida's child abuse laws in chapter 39, F.S. The state attorney, law enforcement agency, and licensing agency are to be automatically notified of all reports of child abuse in a child care program (s. 39.302, F.S.).

Third, in addition to the civil actions that could be taken in response to the misuse of medications in child care programs, s. 827.03(1), F.S., establishes the crime of child abuse which is the intentional infliction of, or intentional act that could result in, mental or physical injury to a child. Committing the crime of child abuse is a felony of the third degree if there is no great bodily harm, permanent disability, or permanent disfigurement to the child. If the abuse results in great bodily harm, permanent disability, or permanent disfigurement to the child, the crime becomes aggravated child abuse and is felony of the first degree [s. 827.03(2), F.S.]. A felony of the third degree is punishable by a term of imprisonment not to exceed 5 years, a \$5,000 fine, or, in the case of a violent career criminal, a longer term of imprisonment (ss. 775.082, 775.083, and 775.084, F.S.). A felony of the first degree is punishable by a term of imprisonment not to exceed 30 years or, under certain circumstances, life, a fine of \$10,000, or a longer term of imprisonment for the violent career criminal (ss. 775.082, 775.083, and 775.084, F.S.).

### **Attention Deficit Hyperactivity Disorder and School Policy**

It is estimated that 1.46 to 2.46 million children, or 3 to 5 percent of the student population, have ADHD. The diagnostic methods, treatment options, and medications have become a very controversial subject, particularly in education. One of the concerns raised has been that school officials are reported to be offering their diagnosis of ADHD and urging parents to obtain drug treatment for the child. These concerns have resulted in the consideration of federal legislation to require states to develop and implement policies and procedures prohibiting school personnel from requiring that a child obtain a prescription for a controlled substance in order to attend school.

The National Conference of State Legislatures reports that a number of states are currently considering legislation related to psychotropic medications and psychiatric treatment. States that passed laws particular to this issue prior to 2003 included Connecticut that prohibited school personnel from recommending the use of psychotropic drugs for any child, but did not prohibit recommending a child be evaluated by a medical practitioner or school personnel from consulting one. Similarly, Virginia directed the Board of Education to develop and implement policies prohibiting school personnel from recommending the use of psychotropic medications for any students.

Concerns raised as the federal legislation has been debated have been that the legislation may deter educators from talking to parents about concerns with a student's emotional well-being and mental health. Educators were identified as a critical source of information about a child's behavior but they may potentially refrain from identifying mental health problems in a child due

to fear of violating the law. Students with ADHD may need the services provided under the federal Individuals with Disabilities Education Act (IDEA) and Section 504 of the Rehabilitation Act of 1973 to assist them with their education needs. Schools are required by IDEA and Section 504 to provide special education or make modifications or adaptations for students whose ADHD adversely affects their educational performance. Adaptations available to assist ADHD students include “curriculum adjustments, alternative classroom organization and management, specialized teaching techniques and study skills, use of behavior management, and increased parent/teacher collaboration.” The position identified by the U.S. Department of Education relative to the role of the educators as it pertains to prescribing medications is that it is the responsibility of the medical professionals, not the educational professionals, to prescribe any medication. However, it was recognized that the input the educators can provide about the student’s behavior can often aid in a diagnosis.

### **III. Effect of Proposed Changes:**

**Section 1.** Amends s. 743.0645, F.S., creating the Center for Juvenile Psychotropic Studies.

This section creates the Center for Juvenile Psychotropic Studies within the Department of Psychiatry in the College of Medicine at the University of Florida. The purpose of the center is to collect, track, and assess information regarding dependent minors in the custody of the state pursuant to chapter 39, 984, or 985, F.S., who have been or currently are being prescribed psychotropic medications.

The term “psychotropic medications” is defined in this section to include medications that require a prescription and are used for the treatment of medical disorders. The definition expires July 1, 2005.

This section specifies that the center must determine the number of children in state custody who are receiving psychotropic medications and any other data relevant to assess scientifically the status of minors, as well as evaluate:

- Information regarding the medical evaluations given to children prescribed medications;
- What other treatments were recommended in addition to the medication and whether those treatments were delivered;
- Whether informed consent was received from legal guardians before treatment;
- Whether follow-up monitoring and treatment was given to the child;
- Whether full records were provided to courts for decisionmaking purposes; and
- Whether the prescription was appropriate for the age and diagnosis of the child.

This section specifies that the director of the center is to be appointed by the dean of the College of Medicine at the University of Florida.

This section creates an advisory board that is required to periodically review and advise the center regarding its actions taken pursuant to the bill’s requirements. The board must consist of nine members who are experts in the field of psychiatric health including:

- The Secretary of DCF or his or her designee;
- The Secretary of DJJ or his or her designee;

- The Secretary of AHCA or his or her designee;
- The Secretary of Health or his or her designee;
- One member appointed by the Senate President from the Florida Psychiatric Society;
- One member appointed by the Speaker of the House of Representatives who is a pediatrician;
- One member appointed by the President of the University of Florida who is an epidemiologist; and
- Two members appointed by the Governor, one of whom has been a guardian ad litem and one of whom is employed by the Florida Mental Health Institute at the University of South Florida.

The center is directed to work in conjunction with DCF, DJJ, and AHCA (to the extent permitted by the privacy requirements of state and federal law) to gather information regarding dependent minors that must include but is not limited to:

- Demographic information to include age, geographic location, and economic status;
- Family history that includes any involvement with the child welfare or juvenile justice system, including social service and court records;
- Medical history of the minor that includes the minor's medical condition;
- All information regarding the medications prescribed or administered to the minor, including information contained in the medication administration record; and
- The practice patterns, licensure and board certification of prescribing physicians.

This section provides immunity from civil liability for persons furnishing medical records in furtherance of the charge of the center, absent bad faith or malice. The section also provides immunity for persons participating in the center's research activities or who provide information to the center regarding the incompetence, impairment, or unprofessional conduct of any health care provider licensed under chapters 458-466, F.S., absent intentional fraud or malice.

This section requires the center to report its findings regarding psychotropic medications prescribed to dependent minors in state custody to the Legislature and the appropriate committee chairs of the Legislature by January 1, 2005.

This section provides that this newly created subsection (6) will expire July 1, 2005.

**Section 2.** Amends s. 39.401, F.S., relating to taking a child alleged to be dependent into custody, to provide that the refusal of a parent, legal guardian, or other person responsible for a child's welfare to administer or consent to the administration of psychotropic medications to the child is not grounds to take the child into custody. The bill prohibits the court from entering an order for the department to take the child into custody based solely on this condition. The bill provides that the child may be taken into custody by the department or by order of the court if the refusal to administer the psychotropic medication or refusal to consent to such administration is found to cause the neglect or abuse of the child.

This provision does not alter the definition of abuse and neglect as it relates to the administration of psychotropic medication, only the conditions under which the child may be taken into custody.

**Section 3.** Creates s. 402.3127, F.S., to prohibit any employee, owner, household member, volunteer, or operator of a child care facility, family day care home, or large family child care home, which is required to be licensed or registered, from administering any medication to a child attending the facility without the written authorization of the child's parent or legal guardian. This prohibition also applies to a child care program operated by a public or nonpublic school that is deemed to be child care pursuant to s. 402.3025, F.S. The written authorization from the parent is required to include certain information, such as the name of the child, dates the authorization is applicable, dosage instruction, and signature of the parent or legal guardian.

The bill allows for the identified individuals in the child care facility, family day care home, or large family child care home to administer medication without written permission if an emergency medical condition exists, the parents are not available, and the medication is administered pursuant to the instructions of a prescribing health care practitioner. An "emergency medical condition" is also defined by the bill as those "circumstances when prudent layperson acting reasonably would believe that an emergency medical condition exists." The parents or legal guardians of the child must be immediately notified by the child care facility, family day care home, or large family child care home of the emergency medical condition and the corrective measures taken. The child care facility, family day care home, or large family child care home is required to immediately notify the child's medical care provider if the parents or legal guardians cannot be located and the emergency medical condition persists.

The bill provides for criminal penalties for failure to comply with the requirements of s. 402.3127, F.S., that is, administering medication to a child attending a child care facility, family day care home, or large family child care home, without written authorization unless the stipulated emergency circumstances are met. It is a third degree felony if the requirements of this section are violated and the violation results in serious injury to the child. If the violation of these requirements does not result in serious injury to the child, it is a misdemeanor of the first degree.

**Section 4.** Amends s. 1006.062, F.S., to direct each school board to adopt rules to prohibit all school board employees from recommending the use of psychotropic medications for any student. All district school board personnel are specifically not prohibited from recommending that a student be evaluated by a medical practitioner. The bill also specifically provides that school board personnel are not prohibited from consulting with a medical practitioner with the consent of the student's parent.

**Section 5.** Provides that the bill will take effect July 1, 2004.

#### **IV. Constitutional Issues:**

##### **A. Municipality/County Mandates Restrictions:**

The provisions of this bill have no impact on municipalities and the counties under the requirements of Article VII, s. 18 of the Florida Constitution.

**B. Public Records/Open Meetings Issues:**

The provisions of this bill have no impact on public records or open meetings issues under the requirements of Article I, s. 24(a) and (b) of the Florida Constitution.

**C. Trust Funds Restrictions:**

The provisions of this bill have no impact on the trust fund restrictions under the requirements of Article III, s. 19(f) of the Florida Constitution.

**V. Economic Impact and Fiscal Note:****A. Tax/Fee Issues:**

None.

**B. Private Sector Impact:**

None.

**C. Government Sector Impact:****Department of Children and Families**

The Department of Children and Family Services reports there will be unknown costs associated with the implementation of this committee substitute related to travel for board members as well as costs to exchange data with the Center for Juvenile Psychotropic Studies. However, it is estimated that these costs will be minimal and can be absorbed within existing resources.

**Department of Juvenile Justice**

The Department of Juvenile Justice reports that in order to meet the data requirements specified by the bill, it will likely need to develop a website or adapt the Juvenile Justice Information System. Six additional staff will be necessary to assist in data collection and entry for this project. The combined costs projected by DJJ for staff, equipment, and travel exceed \$250,000.

**Agency for Health Care Administration**

The bill creates an advisory board that requires the participation of the Secretary of AHCA or his or her designee. Travel costs will be incurred by AHCA. In addition, AHCA will be required to provide claims data to the center. According to AHCA these costs can be absorbed within the existing budget.

**University of Florida**

Staff from the University of Florida estimate that funding in the amount of \$250,000 will be needed to implement the bill. The funding will be used to support staffing needs,

travel, equipment, and supplies. However, a portion of the costs can be absorbed within existing resources.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

The Department of Children and Family Services currently has a contract with the Department of Psychiatry in the College of Medicine at the University of Florida to provide a medication consultation line. The MedConsult line is available to prescribing physicians for consultation, as well as to judges, child welfare workers, guardians ad litem and foster parents for up-to-date information on psychotropic medications, including the side effects and uses of the medications.

Given the extensive issues relating to the treatment of children with psychotropic medications, it may be beneficial for the advisory board to have broader membership. Additional membership could include representatives from other universities, consumers, and advocates.

The requirements for administering medication in child care facilities allows for “medication” to be administered without written authorization of the parent in an emergency and in accordance with the instructions of a medical care provider. The bill does not stipulate whether this applies to prescription or nonprescription medications which could allow for a medication prescribed for another child that is not authorized by a parent to be administered to a child.

**VIII. Amendments:**

None.

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This Senate staff analysis does not reflect the intent or official position of the bill’s sponsor or the Florida Senate.

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# SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

BILL: SB 3018

SPONSOR: Senator Peadar

SUBJECT: Health Care Procedures

DATE: April 15, 2004

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Harkey <i>HA</i>	Wilson <i>W</i>	HC	
2.				
3.				
4.				
5.				
6.				

## I. Summary:

This bill expands the Florida Patient's Bill of Rights and Responsibilities by giving patients access to package prices for the top 50 most utilized elective inpatient and outpatient services and a listing of the top 50 most utilized inpatient and outpatient procedures provided by a hospital or ambulatory surgical center. The bill gives patients the right to receive cost estimates prior to receiving services.

The bill requires licensed hospitals, ambulatory surgical centers, and mobile surgical facilities to electronically publish the prices for certain medical procedures and to provide a reasonable estimate of charges for a proposed medical service upon request.

This bill amends ss. 381.026 and 395.301, F.S.

## II. Present Situation:

### Florida's Patient's Bill of Rights and Responsibilities

The Florida Patient's Bill of Rights and Responsibilities includes a listing of rights related to individual dignity, basic information rights, the right to grievances, the right to obtain information related to accepted payment by the facility, the right to be provided a reasonable estimate of the expected charges, the right to access to emergency care, and the right to know if the treatment is for the purpose of experimental research. In addition, the current statutes specify the responsibilities of a patient of a health care facility and or health care provider.

The Florida Patient's Bill of Rights and Responsibilities, in s. 381.026, F.S., establishes the rights of a patient regarding financial information and disclosure, as follows:

- A patient has the right to be given, upon request, by the responsible provider, his or her designee, or a representative of the health care facility full information and necessary counseling on the availability of known financial resources for the patient's health care.
- A health care provider or a health care facility shall, upon request, disclose to each patient who is eligible for Medicare, in advance of treatment, whether the health care provider or the health care facility in which the patient is receiving medical services accepts assignment under Medicare reimbursement as payment in full for medical services and treatment rendered in the health care provider's office or health care facility.
- A health care provider or a health care facility shall, upon request, furnish a patient, prior to provision of medical services, a reasonable estimate of charges for such services. Such reasonable estimate shall not preclude the health care provider or health care facility from exceeding the estimate or making additional charges based on changes in the patient's condition or treatment needs.
- A patient has the right to receive a copy of an itemized bill upon request. A patient has a right to be given an explanation of charges upon request.

### **Itemized Patient Bill**

Under s. 395.301, F.S., a licensed hospital, ambulatory surgical center, or mobile surgical facility that is not operated by the state must notify a patient, at admission and at discharge, that he or she has the legal right to receive an itemized bill upon request. The facility must provide the itemized bill within 7 days of the patient's discharge or within 7 days of the determination of the loss or expenses from the service.

### **III. Effect of Proposed Changes:**

**Section 1.** Amends s. 381.026, F.S., the Florida Patient's bill of Rights and Responsibilities, to require licensed hospitals, ambulatory surgical centers, and mobile surgical facilities to electronically publish the prices for certain medical procedures. Each licensed facility not operated by the state must make available to the public on its Internet website or by other electronic means package prices for each of the top 50 most frequently used elective inpatient and outpatient procedures. The package pricing must include all hospital-related services and must include separate estimates of costs for professional fees charged by independent contractor physicians or physician groups.

A licensed facility must also make available to the public on its Internet website or by other electronic means each of the top 50 most frequently used inpatient and outpatient procedures. The list must be updated quarterly. The facility must place a notice in the reception areas that such information is available electronically and provide the website address. The licensed facility may indicate that the package pricing is based on a compilation of charges for the average patient and that each patient's bill may vary from the average depending upon the severity of illness and individual resources consumed. The licensed facility may also indicate that the package pricing is negotiable based upon the patient's health plan and the ability to pay. The agency must develop

rules for implementing a uniform mechanism for reporting this information on the facility's website.

The summary of the Florida Patient's Bill of Rights and Responsibilities is amended to establish that a patient has the right to receive, upon request, prior to treatment, a reasonable estimate of charges for the proposed services.

**Section 2.** Adds a new subsection (7) to s. 395.301, F.S., to require each licensed hospital, ambulatory surgical center, or mobile surgical facility that is not operated by the state to make available to the public on its Internet website or by other electronic means package prices for each of the top 50 most frequently used elective inpatient and outpatient procedures. The package pricing must include all hospital-related services and must include separate estimates of costs for professional fees charged by independent contractor physicians or physician groups.

A licensed facility must also make available to the public on its Internet website or by other electronic means the top 50 most frequently used procedures in both the inpatient and outpatient settings. The list must be updated quarterly. The facility must place a notice in the reception areas that such information is available electronically and provide the website address. The licensed facility may indicate that the package pricing is based on a compilation of charges for the average patient and that each patient's bill may vary from the average depending upon the severity of illness and individual resources consumed. The licensed facility may also indicate that the package pricing is negotiable based upon the patient's health plan and the ability to pay. The Agency for Health Care Administration must develop rules for implementing a uniform mechanism for reporting this information on the facility's website.

The bill adds a new subsection (8) to s. 395.301, F.S., to require each licensed facility not operated by the state to, upon request of a prospective patient prior to the provision of medical services, provide a reasonable estimate of charges for the proposed service. Such estimate does not preclude the actual charges from exceeding the estimate based on changes in the patient's medical condition or the treatment needs of the patient as determined by the attending and consulting physicians.

**Section 3.** Provides that the bill will take effect upon becoming a law.

#### **IV. Constitutional Issues:**

##### **A. Municipality/County Mandates Restrictions:**

The provisions of this bill have no impact on municipalities and the counties under the requirements of Article VII, Section 18 of the Florida Constitution.

##### **B. Public Records/Open Meetings Issues:**

The provisions of this bill have no impact on public records or open meetings issues under the requirements of Art. I, s. 24(a) and (b) of the Florida Constitution.

**C. Trust Funds Restrictions:**

The provisions of this bill have no impact on the trust fund restrictions under the requirements of Article III, Subsection 19(f) of the Florida Constitution.

**V. Economic Impact and Fiscal Note:****A. Tax/Fee Issues:**

None.

**B. Private Sector Impact:**

Licensed hospitals, ambulatory surgical centers, and mobile surgical facilities will incur additional costs to compile and make available on the Internet package prices for frequently used elective services with separate estimates of costs for professional fees charged by independent contractor physicians, and for listing other frequently used services.

Self-pay patients, employers, and health plans may benefit from the additional price information afforded patients.

**C. Government Sector Impact:**

The Agency for Health Care Administration estimates the fiscal impact on the agency to be \$76,559 in FY 04-05 and \$73,936 in FY 05-06 with non-recurring expenditures of \$2,623 in FY 04-05 and recurring expenditures of \$73,936 in FY 04-05 and in FY 05-06. Recurring expenditures include \$62,936 for salary and benefits associated with 1 FTE (Governmental Analyst II).

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Amendments:**

None.

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This Senate staff analysis does not reflect the intent or official position of the bill's sponsor or the Florida Senate.

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# SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

BILL: CS/SB 2014

SPONSOR: Comprehensive Planning Committee and Senator Wasserman Schultz

SUBJECT: Public Swimming Pools

DATE: April 16, 2004

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Cooper	Yeatman	CP	Fav/CS
2.	Parham <i>SP</i>	Wilson <i>ju</i>	HC	
3.			AGG	
4.			AP	
5.				
6.				

## I. Summary:

This bill requires all public swimming pools to have child-safety features including a permanent barrier enclosing the pool, self closing gates for pedestrians, and lockable gates other than pedestrian gates. County health departments are required to inspect the barriers and other safety features and must immediately close a pool that is not in compliance. A pool owner or operator who fails to install and maintain the equipment required by this bill could be subject to an administrative fine not to exceed \$1,500. The bill allows the Department of Health (DOH) to recover attorney's fees and costs when they prevail in an enforcement action pursuant to the bill.

The bill specifies that the safety requirements in the bill do not apply to existing pools at any unit, group of units, dwelling, building, or group of buildings within a single complex of buildings, which is rented to guests more than three times in a calendar year for periods of less than 30 days or 1 calendar month, or which is advertised as a place regularly rented to guests.

The safety requirements in the bill apply to all public pools operated or constructed on or after January 1, 2005, except that pools in operation on that date must be brought into compliance by April 1, 2005.

The bill amends s. 514.0115, Florida Statutes.

The bill creates s. 514.0305, Florida Statutes.

## **II. Present Situation:**

### **The Florida Building Code**

Building codes establish minimum safety standards for the design and construction of buildings by addressing such issues as structural integrity; mechanical, plumbing, electrical, lighting, heating, air conditioning, ventilation, fireproofing, and exit systems; safe materials; energy efficiency; and accessibility by persons with physical disabilities. In doing so, these regulations protect lives and property, promote innovation and new technology, and help ensure economic viability through the availability of safe and affordable buildings and structures. The Florida Building Code does not include provisions regulating safety barriers or gates for public swimming pools. However, it does contain such provisions for residential swimming pools.

### **The Residential Swimming Pool Safety Act**

Chapter 2000-143, L.O.F. (now ch. 515, F.S.), created the “Preston de Ibern/McKenzie Merriam Residential Swimming Pool Safety Act,” which requires all new residential swimming pools to be equipped with at least one of four pool safety features; a pool barrier; an exit alarm on doors with pool access; an approved safety cover; or self-closing or self-latching doors providing access to the pool.

In order to pass a building inspection and receive a certificate of completion from the local building official, the pool must comply with the safety requirements of the law. The law created a second degree misdemeanor for violating the terms of the law. This chapter of law is implemented in s. 424.2.17 of the Florida Building Code.

### **Public Swimming and Bathing Facilities**

Chapter 514, F.S., governs the regulation of public swimming and bathing facilities in the state. Section 514.011(1), F.S., defines a public swimming pool as, in part:

“...a conventional pool, spa-type pool, wading pool, special purpose pool, or water recreation attraction, to which admission may be gained with or without payment of a fee and includes, but is not limited to, pools operated by or serving camps, churches, cities, counties, day care centers, group home facilities for eight or more clients, health spas, institutions, parks, state agencies, schools, subdivisions, or the cooperative living-type projects of five or more living units, such as apartments, boardinghouses, hotels, mobile home parks, motels, recreational vehicle parks, and townhouses.”

Section 514.021, F.S., authorizes the Department of Health (DOH) to adopt and enforce rules to protect the health, safety, or welfare of persons using public swimming pools and bathing places. Sanitation and safety standards include, but are not limited to, measures to ensure safety of bathers. DOH is prohibited from establishing regulations governing the construction, erection, or demolition of public swimming pools and bathing places, as this authority is preempted to the Florida Building Commission through adoption and maintenance of the Florida Building Code.

Chapter 64E-9, F.A.C., implements these regulations. Chapter 64E-9.008, F.A.C., provides supervision and safety standards for public pools. Section (2) addresses safety equipment, requiring that all pools have a shepherd's hook, and at least one 18 inch diameter lifesaving ring with sufficient rope attached to reach all parts of the pool from the pool deck. Section (3) requires that all pools with a slope transition have a safety line in place at all times unless a lifeguard or instructor is present. Subsection (4) stipulates that pool covers and solar blankets may only be used during times when the pool is closed. Furthermore, unless the pool cover or solar blanket is secured around the entire perimeter and is designed to support a live load of an adult person, the pool area must be inaccessible to unauthorized individuals during times of cover or blanket use.

This rule does not require safety barriers and does not include gates specifications for public swimming pools. Section 514.0115, F.S., exempts the following public pools from DOH supervision and regulation:

- Private pools and water therapy facilities connected with facilities connected with hospitals, medical doctors' offices, and licensed physical therapy establishments;
- Pools serving no more than 32 condominium or cooperative units which are not operated as a public lodging establishment (except for water quality);
- Pools serving condominium or cooperative associations of more than 32 units and whose recorded documents prohibit the rental or sublease of the units for periods of less than 60 days, under specified conditions;
- A private pool used for instructional purposes in swimming; and
- Any pool serving a residential child care agency registered and exempt from licensure pursuant to s. 409.176, F.S., under specified conditions.

Under s. 514.031, F.S., it is unlawful for a person or public body to operate a public swimming pool without a valid permit from DOH. A person or public body must file an application with DOH with a description of the structure; the source and supply of water; the method and manner of water purification, treatment, disinfection, and heating; safety equipment and standards to be used; measures to ensure personal cleanliness of bathers; and other pertinent information deemed necessary by DOH.

DOH reports that they are responsible for permitting and inspecting approximately 33,000 public swimming pools in Florida. The permitting includes construction approval and an operations permit. Two inspections per year are conducted by DOH as part of the operations permit. A portable pool may not be used as a public pool.

DOH also reports that nationally, drowning was the leading cause of death among children aged 1-4 in 2000. Florida's drowning rate for this age group is more than double the national average, and is higher than any other state in the nation. More than two-thirds of these deaths occurred in swimming pools.

### **III. Effect of Proposed Changes:**

**Section 1.** Creates s. 514.0305, F.S., relating to public pools and safety barriers.

*Subsection (1)* requires public swimming pools to be equipped with:

- A permanent barrier that completely encloses the pool;
- Self-closing pedestrian gates that open outward and are equipped with a releasing mechanism on the pool side of the gate and placed so that a young child cannot reach it; and
- Gates other than pedestrian gates that are equipped with lockable hardware or padlocks that must remain locked when not being used.

*Subsection (2)* requires the county health department to inspect the barriers and other equipment required by the bill during each routine inspection and requires an inspector to immediately close a pool that does not meet the requirements of this section. The owner or operator of a public pool that is closed by an inspector for failure to have and maintain the equipment required by this bill must correct the deficiencies or be subject to an administrative fine not to exceed \$1,500.

This subsection provides that DOH is to be awarded attorney's fees at the rate of \$150 per attorney hour as well as the costs of litigation when the department prevails in an enforcement action pursuant to this section and provides that attorney's fees and litigation costs shall be awarded against the public pool operator by the presiding officer of any proceeding before the Division of Administrative Hearings or before a hearing officer appointed by DOH.

*Subsection (3)* provides that the definitions in s. 515.25, F.S., apply to this section and are incorporated by reference except that the term "public swimming pool" is defined as provided in s. 514.011(2), F.S. Applicable definitions include:

- *Barrier* means a fence, dwelling wall, or non-dwelling wall, or any combination thereof, which completely surrounds the swimming pool and obstructs access to the swimming pool, especially access from the residence or from the yard outside the barrier;
- *Department* means the Department of Health;
- *Public swimming pool* means a swimming pool, as defined in s. 514.011(2), F.S. which is operated, with or without charge, for the use of the general public; however, the term does not include a swimming pool located on the grounds of a private residence; and
- *Young child* means any person less than 6 years of age.

*Subsection (4)* provides that the safety requirements in the bill apply to all public pools operated or constructed on or after January 1, 2005, except that pools in operation on that date must be brought into compliance by April 1, 2005.

*Subsection (5)* provides that this section does not apply to existing pools at any unit, group of units, dwelling, building, or group of buildings within a single complex of buildings, which is rented to guests more than three times in a calendar year for periods of less than 30 days or 1 calendar month, or which is advertised as a place regularly rented to guests.

*Subsection (6)* provides rule authority to DOH to administer the provisions of this section.

**Section 2.** Amends s. 514.0115(2), F.S., providing that pools in condominium complexes which are exempt from supervision or regulation under s. 514.0115(2), F.S., are subject to the requirements of the bill.

**Section 3.** Provides that the bill shall take effect July 1, 2004.

**IV. Constitutional Issues:**

**A. Municipality/County Mandates Restrictions:**

Municipalities and counties that own and or operate public swimming pools will incur the cost of complying with the requirements of the bill. Without information on the cost, it is not possible to know whether the requirements meet the threshold for an impact on municipalities and the counties under the requirements of Article VII, Section 18 of the Florida Constitution.

**B. Public Records/Open Meetings Issues:**

The provisions of this bill have no impact on public records or open meetings issues under the requirements of Art. I, s. 24(a) and (b) of the Florida Constitution.

**C. Trust Funds Restrictions:**

The provisions of this bill have no impact on the trust fund restrictions under the requirements of Article III, Subsection 19(f) of the Florida Constitution.

**V. Economic Impact and Fiscal Note:**

**A. Tax/Fee Issues:**

Under s. 514.033, F.S., the fee schedule for modification of original construction of a public swimming pool is not less than \$100 and not more than \$150. An owner or operator of a public swimming pool that had to modify original construction to meet the requirements of this bill would incur that fee.

**B. Private Sector Impact:**

None.

**C. Government Sector Impact:**

Public entities that own or operate public pools must comply with the requirements of this bill. According to DOH, these costs can range from a few hundred dollars to several thousand dollars, depending on the size of the pool, location of buildings, and other site-specific considerations.

According to DOH, the provision of adequate safety barriers may reduce liability of public swimming pool owners.

DOH and county public health units would be responsible for enforcing the requirements of this bill. DOH reports that the bill will significantly increase the workload of county public health department attorneys and that enforcement cost could be excessive.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Amendments:**

None.

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This Senate staff analysis does not reflect the intent or official position of the bill's sponsor or the Florida Senate.

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# SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

BILL: SB 2604

SPONSOR: Senator Diaz de la Portilla

SUBJECT: Naturopathic Medicine

DATE: April 15, 2004

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Munroe <i>Bgm</i>	Wilson <i>gw</i>	HC	
2.			CJ	
3.			AHS	
4.			AP	
5.				
6.				

## I. Summary:

The bill revises the regulation of naturopathy in Florida to establish a mechanism to again allow the initial licensure of naturopathic physicians. A 7-member Board of Naturopathic Medicine is created to regulate naturopathic medicine, rather than the Department of Health. The newly created board is given rulemaking authority to administer the regulation of naturopathic medicine. The bill revises the definitions of practice of naturopathy. "Doctor of naturopathic medicine" or "naturopathic physician," means a person licensed to practice naturopathic medicine. The definition of "natureopathy," "naturopathy," and "naturopathic medicine" is revised to include surgery that is not major and to exclude acupuncture or oriental medicine.

The bill establishes licensing requirements for naturopathic physicians. The applicant must obtain a passing score as determined by the Board of Naturopathic Medicine from one of six licensure examinations (the Naturopathic Physicians Licensing Examination, the Federation Licensing Examination, the United States Medical Licensing Examination, the state or national board examination for licensure in another state which is comparable to the examination for licensure in Florida, a Department of Health special purpose examination, or the Comprehensive Osteopathic Medical Licensing Examination). The board may require an applicant who has failed the licensure examination after five attempts to complete additional remedial education or training to sit for the examination a sixth or subsequent time. The applicant must be physically and mentally fit to practice as a doctor of naturopathic medicine, have not been found guilty of a felony and have not his license to practice any profession refused, revoked, or suspended by any other state, district, or territory of the United States or another country for reasons that relate to her or his ability to practice as a doctor of naturopathic medicine, and complete a one year internship or residency.

The bill specifies that a physician who holds a doctor of medicine or doctor of osteopathy degree, who has completed a 1-year internship approved by the American Medical Association or the American Osteopathic Association, and who is licensed under ch. 462, F.S., as a doctor of naturopathic medicine or as a naturopathic physician has rights and privileges equal to those of Florida-licensed medical physicians and osteopathic physicians.

The bill exempts from the naturopathic licensing requirements an individual who is engaged in selling vitamins, health foods, dietary supplements, herbs, or other products of nature, the sale of which is not otherwise prohibited under state or federal law. This exemption does not allow a person to diagnose any human disease, ailment, injury, infirmity, deformity, pain or other condition or prohibit providing information regarding vitamins, health foods, dietary supplements, herbs, or other products of nature when such information is truthful and is not misleading. Religious practices that do not involve the use of prescription drugs, and the administration of domestic or family remedies are also exempted from naturopathic licensure requirements.

This bill amends sections 462.01, 462.023, 462.08, 462.11, 462.13, 462.14, 462.16, 462.17, 462.18, 462.19, 462.2001, 20.43, 381.0031, 468.301, 476.044, 477.0135, 485.003, 486.161, 627.351, 893.02, and 921.0022, Florida Statutes.

This bill creates ss. 462.0215, 462.193, 462.195, F.S., and two undesignated sections of law.

## **II. Present Situation:**

### **Naturopathy**

The term “naturopathy” was used in the late nineteenth century to refer to an emerging system of natural therapies and philosophy to treat disease. Naturopathic physicians diagnose, treat, and care for patients using a system of practice that bases treatment on natural laws governing the human body. These practitioners may provide treatment to patients using psychological, mechanical, and other means to purify, cleanse, and normalize human tissues for the preservation and restoration of health. This may include the use of air, water, light, heat, earth, food and herb therapy, psychotherapy, electrotherapy, physiotherapy, minor surgery, and naturopathic manipulation. Naturopathic physicians are trained in standard medical sciences and in the use and interpretation of standard diagnostic instruments. Naturopathic medicine stresses a holistic approach to health care which involves studying and working with the patient mentally and spiritually, as well as physically, and developing an understanding of the patient in the patient’s chosen environment.

Twelve states currently have naturopathy licensing laws: Alaska, Arizona, California, Connecticut, Hawaii, Maine, Montana, New Hampshire, Oregon, Utah, Vermont, and Washington. In some jurisdictions, the scope of practice for naturopathy includes alternative modalities such as acupuncture, biofeedback, homeopathy, hypnotherapy or massage. A few states permit naturopaths to perform minor surgery and naturopathic or natural childbirth. In general, the practice acts allow naturopaths to utilize an extensive array of therapies and procedures. In several states, licensees must have a special certificate to practice natural childbirth, acupuncture, or to dispense natural substances or devices. In 2002, Kansas began to

register naturopaths. Kansas did not sanction licensing or any practice of medicine other than the use botanical treatments.

California passed legislation in September, 2003, establishing licensure of naturopathic doctors. The California Medical Association opposed the legislation because it would allow naturopathic doctors to be primary care providers, including calling themselves physicians, prescribing medications, performing minor surgical procedures, and delivering babies. The medical association succeeded in getting restrictions that naturopathic doctors may not call themselves physicians and that require physician oversight for prescribing medications and childbirth assistance. Language on minor surgery was limited to treating minor abrasions and superficial treatments, such as removing warts. The legislation leaves the terms “naturopath” and “naturopathy” in the public domain so that graduates of naturopathic vocational programs or correspondence courses can describe their practice. It does not prevent or restrict the practices or activities of any other practitioner, consultant, or individual; nor does it restrict or prevent individuals engaged in the sale of vitamins, nutritional supplements, herbs or homeopathic remedies.

In Florida, chapter 462, F.S., provides for the regulation of the practice of natureopathy and naturopathy by the Department of Health. “Natureopathy” and “naturopathy” is defined as synonymous terms to mean the use and practice of psychological, mechanical, and material health sciences to aid in purifying, cleansing, and normalizing human tissues for the preservation or restoration of health, according to the fundamental principles of anatomy, physiology, and applied psychology, as may be required. Naturopathic practice employs, among other agencies, phytotherapy (botanical\herbal medicine), dietetics, psychotherapy, suggestotherapy (process of influencing attitudes and behaviors by suggestions), hydrotherapy (scientific use of water in the treatment of diseases), zone therapy (a process of using various points on the human body causing a reflex action in another part of the body to treat disease and relieve pain), biochemistry, external applications, electrotherapy (generation of heat in the body by use of electrical current), mechanotherapy (manipulation of the body tissues and joints), mechanical and electrical appliances, hygiene, first aid, sanitation, and heliotherapy (the use of sun rays in the treatment). The definition of “naturopathy” further provides that nothing in the chapter may be construed to authorize any Florida-licensed naturopathic physician to practice materia medica (prescribe) or surgery or chiropractic medicine. The definition of naturopathy may not affect the practice of osteopathic medicine, chiropractic medicine, Christian Science, or any other treatment authorized and provided for by law for the cure or prevention of disease and ailments.

Chapter 462, F.S., prohibits the issuance of a license to any person who was not practicing naturopathy in Florida as of July 1, 1959. The chapter authorizes the Department of Health to adopt rules to implement the regulation of naturopathic medicine including the establishment of fees. The chapter provides procedures for those naturopathic physicians currently licensed in Florida to renew their license. The department reports that there are 7 naturopathic physicians currently licensed to practice in Florida.

## History of Naturopathy in Florida

Naturopathy was initially recognized by the Legislature in the Medical Act of 1921<sup>1</sup> which defined the practice of medicine and exempted naturopaths from the medical practice act. Naturopathic practitioners were first licensed in Florida in 1927.<sup>2</sup> Doctors of Naturopathy were required to observe state, county, and municipal regulations regarding the control of communicable diseases, the reporting of births and deaths, and all matters relating to the public health as was required of other “practitioners of the healing arts.” Between 1947 and 1954, legal cases were decided regarding the rights of naturopaths to prescribe narcotic drugs. The Circuit Court in Pinellas County held that practitioners of naturopathy had the right to prescribe narcotic drugs.<sup>3</sup> On appeal the Florida Supreme Court affirmed the lower court’s decision.<sup>4</sup>

Chapter 57-129, Laws of Florida, abolished the Board of Naturopathic Examiners and significantly revised the regulation of naturopathy and placed the regulation under the Florida State Board of Health. Naturopaths were classified into three groups based on the length of time that the practitioner was licensed in the state. Under that law, those licensed less than 2 years could not have their licenses renewed; those licensed more than 2 years but less than 15 years would be denied prescribing medicine in any form and those licensed more than 15 years would be prohibited from prescribing narcotic drugs. The Florida Supreme Court held that the naturopathic laws, as amended by ch. 57-129, L.O.F., were unconstitutional and void.<sup>5</sup>

In 1959, the Legislature abolished the licensing authority for naturopathy.<sup>6</sup> Only those naturopathic practitioners licensed at that time who had been residents of Florida for 2 years prior to enactment of ch. 59-164, L.O.F., were authorized to renew their licenses. According to the Department of Health, only seven naturopathic practitioners have active licenses to practice in Florida. These licensees are regulated by the Division of Medical Quality Assurance of the Department of Health. In the last two legislative sessions, naturopathic physicians have sought to reestablish licensure in Florida with a board and an expanded scope of practice.

## National Accreditation Organization

The Council on Naturopathic Medical Education (CNME) is recognized by the U.S. Department of Education as an accrediting agency for naturopathic graduate education programs under Sections 114 and 496 of the Higher Education Act of 1965. The Higher Education Act of 1965 requires federal recognition of accrediting organizations in order for the programs they accredit to be eligible for participation in federal educational loan programs and to receive federal grants.

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<sup>1</sup> See chapter 8415, Laws of Florida.

<sup>2</sup> See ch. 12286, Laws of Florida.

<sup>3</sup> *In re: Complaint of Melser*, 32 So.2d 742 (Fla.1947). See also *State Department of Public Works v. Melser*, 69 So.2d 347 at 353 (Fla. 1954).

<sup>4</sup> *Supra*. See also Attorney General Opinion 54-96 and s. 893.02 (19), F.S., relating to controlled substances, which defines “practitioner” to include “... a naturopath licensed pursuant to chapter 462, F.S.” But see also *In 1939*, the 5th Circuit Fed. Ct. (which includes Louisiana, Mississippi, and Texas) interpreted the Federal Narcotic Drug Act which determined that a “naturopath” was not a “physician;” therefore, they were prohibited from prescribing narcotic drugs. The court determined that even under phytotherapy, they could not prescribe drugs. *Perry v. Larson*, 104 F.2d 728 (1939).

<sup>5</sup> See *Eslin v. Collins*, 108 So.2d 889 (Fla. 1959).

<sup>6</sup> See ch. 59-164, L.O.F.

CNME lost its federal recognition, January 16, 2001, because the National Advisory Committee on Institutional Quality and Integrity of the U.S. Secretary of Education found that CNME had not responded appropriately to violations of its standards at Southwest College of Naturopathic Medicine and Health Sciences in Tempe, Arizona. The college had gone through an administrative upheaval that nearly led to its closure in 1997 and 1998. The committee concluded that CNME had failed to issue a timely order to show cause why Southwest should not have its candidacy for accreditation ended.

On September 10, 2003, CNME regained its recognition by the U.S. Department of Education. CNME was given initial recognition for two years as an accrediting agency for graduate-level, four-year naturopathic medical education programs leading to the Doctor of Naturopathic Medicine (N.M.D.) or Doctor of Naturopathy (N.D.) degree.

### **Naturopathic Medical Colleges**

There are three accredited colleges of naturopathic medicine in the United States: Bastyr University, Kenmore, Washington; National College of Naturopathic Medicine, Portland, Oregon; and Southwest College of Naturopathic Medicine, Tempe, Arizona. The graduates of these programs receive a Doctor of Naturopathic Medicine degree after 4 years of professional study. Admission requirements include completion of a bachelor's degree before matriculation into the naturopathic medicine program with specified exceptions, including the following courses: inorganic chemistry with lab, organic chemistry with lab, biology with lab, physics, and psychology.

Bastyr University (Seattle, Washington) was founded in 1978 to train naturopathic physicians. Degree programs have been added in nutrition, acupuncture, oriental medicine and psychology. Bastyr is accredited by the Council on Naturopathic Medical Education (CNME) and the Commission on Colleges of the Northwest Association of Schools and Colleges. The National College of Naturopathic Medicine (Portland, Oregon) was founded in 1956. It is the oldest naturopathic medical school in North America. The Southwest College of Naturopathic Medicine and Health Sciences (Tempe, Arizona) has a Doctor of Naturopathic Medicine program which was started in 1993. Southwest College is approved by an autonomous Arizona Naturopathic Physicians Board of Medical Examiners and by the Arizona Board for Private Post-secondary Education. The University of Bridgeport, College of Naturopathic Medicine (Bridgeport, Connecticut) was granted candidacy status by the Council on Naturopathic Medical Education in 2001.

The Florida College of Integrative Medicine/I.W. Lane College of Integrative Medicine (Orlando, FL) was established in 1990 as the National College of Oriental Medicine with a single program in Acupuncture, Herbology and Oriental Medicine. Currently it is undergoing changes. On May 14, 2003, the Council on Naturopathic Medical Education (CNME) accepted the Florida College of Integrative Medicine's application for candidacy for accreditation of its naturopathy program. Candidacy status indicates the college or program satisfies the eligibility requirements, complies with the standards to the degree expected for its stage of development, and has demonstrated the potential for achieving accreditation within five years of having obtained candidacy. On October 8, 2003, the Florida College of Integrative Medicine closed on transfer of

ownership of the Doctor of Naturopathic Medicine program to the I.W. Lane College of Integrative Medicine.

### **III. Effect of Proposed Changes:**

**Section 1.** Creates an undesignated section of law, to redesignate ch. 462, F.S., which is entitled “Naturopathy” to “Naturopathic Medicine.”

**Section 2.** Amends s. 462.01, F.S., relating to definitions, to define “board” to mean the Board of Naturopathic Medicine. “Doctor of naturopathic medicine” or “naturopathic physician” means a person licensed to practice naturopathic medicine. The definition of “natureopathy,” “naturopathy,” and “naturopathic medicine” is revised to include surgery that is not major and to exclude acupuncture or oriental medicine.

**Section 3.** Creates s. 462.0215, F.S., relating to a Board of Naturopathic Medicine, to establish a seven-member board within the Department of Health, and conditions of appointment, membership, and terms of office. The board in conjunction with the department must establish a disciplinary training program for members of the board. The program must provide for initial and periodic training in the grounds under which a licensed naturopathic physician may be subject to discipline. A member of the board may not participate on a probable cause panel or in a disciplinary decision of the board unless she or he has completed the disciplinary training program. During the time board members are appointed to a probable cause panel, they must attempt to complete their work on every case presented to them. If consideration of a case is begun but is not completed during the term of the board members on the panel, they may reconvene as a probable cause panel for the purpose of completing their deliberations on that case. All provisions of ch. 456, F.S., relating to activities of the board are applicable. Chapter 456, F.S., provides general regulatory provisions for health care practitioners.

**Section 4.** Amends s. 462.023, F.S., relating to powers and duties of the board, to delete the provision that prohibited the Department of Health from adopting any new rules which would cause any person who was not licensed as a naturopathic physician on July 1, 1959, to become licensed.

**Section 5.** Amends s. 462.08, F.S., relating to the renewal of license to practice naturopathy, to change references to “naturopathy” to “naturopathic medicine” to conform to definitions which are revised in the bill.

**Section 6.** Amends s. 462.11, F.S., relating to requirements for naturopathic physicians to comply with all state or local regulations regarding disease, reporting of births and deaths, and other matters pertaining to public health, to change references to “naturopathy” to “naturopathic medicine” or “naturopathic physicians” to conform to definitions which are revised in the bill.

**Section 7.** Amends s. 462.13, F.S., relating to additional powers and duties of the Department of Health, to establish the authority of the Board of Naturopathic Medicine as created in the bill. The board will assume the existing powers and duties held by the department in its enforcement of regulation of naturopathic medicine.

**Section 8.** Amends s. 462.14, F.S., relating to grounds for disciplinary action, to establish the Board of Naturopathic Medicine's regulatory authority to enter an order, deny licensure, or impose penalties on applicants or licensed naturopathic physicians and changes references to "naturopathy" or "doctor of naturopathic medicine" to conform to definitions which are revised or created in the bill.

**Section 9.** Amends s. 462.16, F.S., relating to reissue of licenses, to establish the authority of the Board of Naturopathic Medicine to set fees not to exceed \$250 for the reissuance of a naturopathic medicine license and changes references to "naturopathy" or "naturopathic medicine" to conform to definitions which are revised or created in the bill. Obsolete terminology is revised.

**Section 10.** Amends s. 462.17, F.S., relating to penalties applicable to naturopathy, to change references to "naturopathy" to "naturopathic medicine" to conform to definitions which are revised or created in the bill.

**Section 11.** Amends s. 462.18, F.S., relating to educational requirements for naturopathic physicians, to establish the authority of the Board of Naturopathic Medicine over educational requirements for license renewal, to change references to "naturopathy" to "naturopathic medicine" to conform to definitions which are revised or created in the bill, and to revised obsolete terminology.

**Section 12.** Amends s. 462.19, F.S., relating to renewal of license for naturopathic physicians, to increase the fee cap for license renewal from \$50 to \$100.

**Section 13.** Creates s. 462.193, F.S., relating to licensure by examination; requirements; fees, to provide requirements for a person to become licensed as a naturopathic physician in Florida. The Department of Health must license each applicant who the Board of Naturopathic Medicine certifies: has completed the application form and paid an application fee no greater than \$500; is at least 21 years of age; is of good moral character; and has not committed any act or offense which would constitute the basis for disciplining a naturopathic physician. The applicant must meet one of following naturopathic physician education and postgraduate training requirements: graduation from an approved school of naturopathic medicine which is licensed by the Florida Commission for Independent Education to grant the degree of Doctor of Naturopathic Medicine; graduation from a naturopathic medical school or a naturopathic college recognized and approved by the Council on Naturopathic Medical Education; graduation from a naturopathic medical school that was at the time licensed by a state board of education and approved by that state's naturopathic licensure board, which has requirements comparable to those of this state; or graduation from an international medical school listed by the World Health Organization and deemed eligible by the Educational Commission for Foreign Medical Graduates to be examined in the basic and clinical medical sciences, or a graduate of an accredited United States allopathic or osteopathic medical school, and has completed a 2-year course in naturopathic medicine from a naturopathic medical school or a naturopathic college recognized and approved by the Council on Naturopathic Medical Education.

The applicant must submit fingerprints and payment in an amount to cover the costs for a criminal history background check. The applicant must obtain a passing score as determined by the Board of Naturopathic Medicine from one of six licensure examinations (the Naturopathic Physicians Licensing Examination, the Federation Licensing Examination, the United States Medical Licensing Examination, the state or national board examination for licensure in another state which is comparable to the examination for licensure in Florida, a Department of Health special purpose examination, or the Comprehensive Osteopathic Medical Licensing Examination). The board may require an applicant who has failed the licensure examination after five attempts to complete additional remedial education or training to sit for the examination a sixth or subsequent time. The applicant must be physically and mentally fit to practice as a doctor of naturopathic medicine, have not been found guilty of a felony and have not his license to practice any profession refused, revoked, or suspended by any other state, district, or territory of the United States or another country for reasons that relate to her or his ability to practice as a doctor of naturopathic medicine, and complete a one year internship or residency.

The section specifies that a physician who holds a doctor of medicine or doctor of osteopathy degree, who has completed a 1-year internship approved by the American Medical Association or the American Osteopathic Association, and who is licensed under ch. 462, F.S., as a doctor of naturopathic medicine or as a naturopathic physician has rights and privileges equal to those of Florida-licensed medical physicians and osteopathic physicians.

The section provides alternative administrative procedures for the Board of Naturopathic Medicine or the Department of Health to issue a 90-day licensure delay if the board or department has reason to believe that the licensure applicant does not meet licensure requirements. The 90-day licensure delay must be issued in writing by the department to notify the applicant regarding the delay. The board may not certify any applicant for licensure who is under investigation in another jurisdiction for an offense that would constitute a violation of the naturopathic act until the investigation has been completed. The board may enter an order that imposes one or more sanctions to implement its authority to certify an applicant for licensure.

**Section 14.** Creates s. 462.195, F.S., relating to exemptions from naturopathic licensure requirements, to exempt an individual who is engaged in selling vitamins, health foods, dietary supplements, herbs, or other products of nature, the sale of which is not otherwise prohibited under state or federal law. This exemption does not allow a person to diagnose any human disease, ailment, injury, infirmity, deformity, pain or other condition or prohibit providing information regarding vitamins, health foods, dietary supplements, herbs, or other products of nature when such information is truthful and is not misleading.

Religious practices that do not involve the use of prescription drugs, and the administration of domestic or family remedies are also exempted from naturopathic licensure requirements.

**Section 15.** Amends s. 462.2001, F.S., relating to a savings clause, to change references to “naturopathy” to “naturopathic medicine” to conform to definitions which are revised or created in the bill. Naturopathic physician licenses that are valid on July 1, 2004, shall remain in full force and effect.

**Section 16.** Creates an undesignated section of law, to provide that licensed doctors of naturopathic medicine or naturopathic physicians shall retain the rights and privileges they had before implementation of the amendments to the naturopathic practice act.

**Section 17.** Amends s. 20.43, F.S., relating to the organization of the Department of Health, to establish the Board of Naturopathic Medicine.

**Section 18.** Amends s. 381.0031, F.S., relating to reports of diseases of public health significance, to change references to “naturopathy” to “naturopathic medicine” to conform to definitions which are revised or created in the bill.

**Section 19.** Amends s. 468.301, F.S., relating to radiologic technology, to change references to “naturopathy” to “naturopathic medicine” to conform to definitions which are revised or created in the bill.

**Section 20.** Amends s. 476.044, F.S., relating to barbering, to change references to “naturopathy” to “naturopathic medicine” to conform to definitions which are revised or created in the bill.

**Section 21.** Amends s. 477.0135, F.S., relating to cosmetology, to change references to “naturopathy” to “naturopathic medicine” to conform to definitions which are revised or created in the bill.

**Section 22.** Amends s. 485.003, F.S., relating to hypnosis, to change references to “naturopathy” to “naturopathic medicine” to conform to definitions which are revised or created in the bill.

**Section 23.** Amends s. 486.161, F.S., relating to physical therapy, to change references to “naturopath” to “naturopathic physician” to conform to definitions which are revised or created in the bill.

**Section 24.** Amends s. 627.351, F.S., relating to insurance risk apportionment plans, to change references to “naturopaths” to “naturopathic physicians” to conform to definitions which are revised or created in the bill.

**Section 25.** Amends s. 893.02, F.S., relating to controlled substances, to change references to “naturopath” to “naturopathic physician” to conform to definitions which are revised or created in the bill.

**Section 26.** Amends s. 921.0022, F.S., relating to the criminal punishment code, to change references to “naturopathy” to “naturopathic medicine” to conform to definitions which are revised or created in the bill.

**Section 27.** Provides an effective date of July 1, 2004.

**IV. Constitutional Issues:****A. Municipality/County Mandates Restrictions:**

The provisions of this bill have no impact on municipalities and the counties under the requirements of Article VII, s. 18 of the Florida Constitution.

**B. Public Records/Open Meetings Issues:**

The provisions of this bill have no impact on public records or open meetings issues under the requirements of Art. I, s. 24(a) and (b) of the Florida Constitution.

**C. Trust Funds Restrictions:**

The provisions of this bill have no impact on the trust fund restrictions under the requirements of Article III, Subsection 19(f) of the Florida Constitution.

**V. Economic Impact and Fiscal Note:****A. Tax/Fee Issues:**

Naturopathic physicians will be subject to an increase in the fee cap for license renewal from \$50 to \$100.

The Board of Naturopathic Medicine is authorized to set fees not to exceed \$250 for the reissuance of a naturopathic medicine license.

Naturopathic physician applicants must pay an application fee no greater than \$500 and an amount equal to costs incurred by the Department of Health for the criminal background check of the applicant.

**B. Private Sector Impact:**

Naturopathic physicians who are currently licensed in Florida will have increased licensure fees, and some alternative health related practices may be restricted.

**C. Government Sector Impact:**

The Department of Health estimates that the board would operate at a deficit because of the small licensure base and that costs of regulation will be met by other licensed professions out of the Medical Quality Assurance Trust Fund. The department estimates that it will incur expenditures equal to \$58,374 for fiscal year 2004-2005 and \$54,337 for fiscal year 2005-2006. The department estimates that its costs will be offset by its receipt of revenue equal to \$50,000 each year for fiscal years 2004-2005 and 2005-2006.

According to the Department of Health, estimated costs for establishing the Board of Naturopathic Medicine are based on the assumption that there will be 4 board meetings in fiscal year 2004-2005 and one board meeting in fiscal year 2005-2006. Each board meeting will be 1 day in duration. Costs associated with a board meeting include: \$50 for

board member compensation; average round trip travel costs of \$250; one day per diem of \$26; and one night hotel costs at \$99 per night.

The department estimates that the support costs of implementing the board include 1 position, pay grade 17, with medium travel. Salary and benefits were computed using 10 percent above the annual minimum plus 28 percent for benefits.

The amount of allocated expenses that support other regulation functions could range anywhere from \$75,000 to \$200,000 per year.

The revenue estimates are based on an estimated application fee of \$500 and the department estimates that each year 100 individuals would apply for licensure. Estimated renewals would be \$500 every two years. The first renewal cycle would be in fiscal year 2005-2006. Potential renewal revenues in fiscal year 2005-2006 are estimated at \$104,000 based on the current number of licensees (7) and renewal of the 100 new licensees in fiscal year 2004-2005 and fiscal year 2005-2006. If the estimate of 100 new licensees per year for the 2 years after implementation is too high, then revenues will be affected and costs will not be covered.

#### **VI. Technical Deficiencies:**

None.

#### **VII. Related Issues:**

According to the Department of Health, the bill provides that naturopathic physicians will have the same scope of practice as allopathic and osteopathic physicians and include materia medica (prescribing) and the performance of minor surgery. The term minor surgery is not defined. The bill does not require that the educational and training component required for licensure meet the same standards as allopathic and osteopathic physician licensure. According to the Department of Health, this may be a patient safety issue.

The bill specifies that a physician who holds a doctor of medicine or doctor of osteopathy degree who has completed a 1-year internship approved by the American Medical Association or the American Osteopathic Association, and who is licensed under ch. 462, F.S., as a doctor of naturopathic medicine or as a naturopathic physician has rights and privileges equal to those of Florida-licensed medical physicians and osteopathic physicians.

The Department of Health has expressed a concern that the effective date of the bill of July 1, 2004, does not provide adequate time to put in place the necessary support for a new board or adequate time to consider and appoint board members.

The changes to s. 462.193, F.S., relating to licensure by examination; requirements; fees, requires graduation from a licensed Florida school, other state approved school, or a school accredited by the Council on Naturopathic Medical Education. This provision allows graduation from schools that are not accredited by the national accrediting entity for naturopathic medicine. The bill also allows applicants to pass one of 6 possible examinations. The department reports

that there is an incorrect reference to a state special purpose examination (SPEX). Section 456.017((1)(b)2., F.S., prohibits the Department of Health from administering a state-developed written examination after December 31, 2001. The Department of Health has indicated that it does not have such an examination, the Federation of State Medical Boards offers the SPEX.

The provision that currently licensed naturopaths retain the same rights and privileges they had prior to implementation of the bill may continue what legal rights such practitioners currently have for materia medica (prescribing) under case law.<sup>7</sup> According to the department, the provision will allow the 7 existing naturopaths currently performing acupuncture to continue to do so, but naturopathic physicians licensed after implementation of the bill are prohibited from doing so. According to the U.S. Drug, Enforcement Administration, 3 of the existing naturopaths hold a current DEA registration which is renewable every 3 years, and 1 practitioner among the 7 licensees held a DEA registration which expired on December 31, 2003, and 3 of licensed naturopaths do not currently hold a DEA registration. The DEA registration authorizes the practitioner who holds the registration to prescribe narcotics (controlled substances).

#### **VIII. Amendments:**

None.

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This Senate staff analysis does not reflect the intent or official position of the bill's sponsor or the Florida Senate.

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<sup>7</sup> See *In re: Complaint of Melser*, 32 So.2d 742 (Fla.1947). See also *State Department of Public Works v. Melser*, 69 So.2d 347 at 353 (Fla. 1954) and s. 893.02, F.S., and AGO 54-96 *Supra*.

# SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

BILL: SB 92

SPONSOR: Senator Cowin

SUBJECT: Health Care

DATE: April 16, 2004

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Harkey <i>JH</i>	Wilson <i>gn</i>	HC	
2.			JU	
3.			AHS	
4.			AP	
5.				
6.				

## I. Summary:

The bill creates the "Women's Health and Safety Act;" amending s. 390.012, F.S., to require separate rules for abortions performed in licensed abortion clinics during the first trimester of pregnancy, and for those abortions performed in licensed abortion clinics after the first trimester of pregnancy. The rules may not impose an unconstitutional burden, rather than a legally significant burden, on a woman's freedom to decide whether to terminate her pregnancy.

The bill requires licensed abortion clinics to develop policies to protect the health, care, and treatment of patients and requires that these policies include obtaining informed consent of patients and for postoperative care of patients suffering complications from an abortion.

This bill amends s. 390.012, F.S., and creates one unnumbered section of law.

## II. Present Situation:

### The Trimester Framework for State Regulation of Abortion

The landmark case of *Roe v. Wade*, decided in 1973, established that a woman's right to have an abortion is part of the fundamental right to privacy<sup>1</sup>. The decision in *Roe v. Wade*, established a "trimester framework" in which the balance between privacy of an individual woman's medical decision and a state's interest in protecting maternal health and the potential life of the fetus changed according to the trimester of the pregnancy. In the first trimester of pregnancy, abortion is viewed as a private medical decision. During the second trimester of pregnancy, the state's interest in protecting maternal health by regulating abortion becomes compelling. In the third

<sup>1</sup> 410 U.S. 113 (1973)

trimester of pregnancy, when a fetus could survive outside the mother's body the state could ban abortions except in cases where abortion was necessary to save the life or health of the mother.

### **Regulation of Abortion Clinics**

The Agency for Health Care Administration (AHCA) and the Department of Health (DOH) have promulgated detailed rules regulating the licensure of and setting clinical standards for surgical facilities, including physicians' offices (Chapter 64B8-9.009, F.A.C.) and ambulatory surgical centers (Chapter 59A-5, F.A.C.). AHCA has also promulgated rules regulating abortion clinics (Chapter 59A-9, F.A.C.).

Under s. 390.012(1), F.S., AHCA's rulemaking authority for abortion clinics is limited to the promulgation of rules that are "comparable to rules which apply to all surgical procedures requiring approximately the same degree of skill and care as the performance of first trimester abortions." According to DOH and AHCA, since this statute was originally passed, abortions performed after the first trimester have become more commonplace. AHCA reports that the agency's authority to protect patient health is limited by the authorizing language in statute and rule, which sets the clinical standard for such rules at a level lower than that necessary to benefit patients receiving abortions after the first trimester of pregnancy.

There are currently 72 licensed abortion clinics. AHCA does not collect data that would allow it to know which of these clinics perform post-first trimester abortions.

AHCA's surveyors examine records in the front office of an abortion clinic; they do not inspect facilities. The local Fire Marshall would be responsible for inspecting the buildings.

Surveyors check for the following:

- That the license is current and posted in a conspicuous place.
- That abortions are performed only by a licensed physician.
- That fetal remains are disposed of in a sanitary and appropriate manner (inspector reviews the contract for biohazard disposal).
- That a complete, accurately documented clinical record is maintained on each patient.
- That clinical records are kept on file for at least 5 years.
- That the number of terminations of pregnancy is reported to the Office of Vital Statistics within the timeframe established in law.

### **Prohibited Acts**

Under s. 797.03, F.S., it is unlawful for any person to perform or assist in performing an abortion except in an emergency care situation, other than in a licensed abortion clinic, licensed hospital, or physician's office. It is unlawful for anyone to operate an abortion clinic without a license or to perform a third trimester abortion in any setting other than a hospital. A violation of these provisions is a second degree misdemeanor punishable under ss. 775.082 or 775.083, F.S.

### **Reports of Induced Termination of Pregnancy in Florida**

The DOH, Office of Vital Statistics, collects all statistical data and analysis on termination of pregnancies. Section 390.0112(1), F.S., requires the report to be filed with AHCA; however, it is the practice of the agencies (DOH and AHCA) to direct the medical directors and physicians to file the report with DOH. Chapter 59A-9.034, F.A.C., requires that an abortion clinic must submit a cumulative report each month to the Office of Vital Statistics. AHCA licenses and inspects abortion clinics, but all reporting from physicians or medical directors regarding termination of pregnancies is sent directly to DOH, Office of Vital Statistics, where the data is entered and reports are prepared.

Reports are confidential and will not be revealed except under the order of a court. Statutorily, such reports include the following information:

- Number of procedures performed;
- Reason for pregnancy termination (personal choice, physical condition, mental condition, abnormal fetus, or other reason) which must be specified; and
- Period of gestation at the time such procedure was performed.

According to the Office of Vital Statistics, 87,964 abortions were performed in Florida in 2002. Of these, 78,997 were performed during the first trimester (at or under 12 weeks of gestation); 8,180 were performed in the second trimester (13-24 weeks of gestation); and 61 were performed in the third trimester (at or after 25 weeks of gestation). For 726 of the reported abortions the gestational age was unknown.

### **III. Effect of Proposed Changes:**

**Section 1.** Provides a popular title for the bill—"The Women's Health and Safety Act".

**Section 2.** Amends s. 390.012, F.S., to increase AHCA's authority to develop rules for licensed abortion clinics, particularly for those that perform abortions after the first trimester. The rules for first-trimester abortions must be comparable to those that apply to surgical procedures requiring approximately the same degree of skill and care as the performance of abortions during the first trimester. For clinics that perform abortions after the first trimester, the rules must be comparable to those that apply to surgical procedures requiring approximately the same degree of skill and care as the performance of abortions after the first trimester.

The bill requires the Agency to develop rules that would be in compliance with s. 797.03, F.S., which requires that all third trimester abortions be performed only in a hospital. The rules may not impose an unconstitutional burden, rather than a legally significant burden, on a woman's freedom to decide whether to terminate her pregnancy.

Each abortion clinic must develop policies to protect the health, care, and treatment of patients and these policies must include obtaining informed consent of patients and for postoperative care of patients suffering complications from an abortion.

**Section 3.** Provides that the bill will take effect July 1, 2004.

**IV. Constitutional Issues:****A. Municipality/County Mandates Restrictions:**

The provisions of this bill have no impact on municipalities and the counties under the requirements of Article VII, Section 18 of the Florida Constitution.

**B. Public Records/Open Meetings Issues:**

The provisions of this bill have no impact on public records or open meetings issues under the requirements of Art. I, s. 24(a) and (b) of the Florida Constitution.

**C. Trust Funds Restrictions:**

The provisions of this bill have no impact on the trust fund restrictions under the requirements of Article III, Subsection 19(f) of the Florida Constitution.

**D. Other Constitutional Issues:****Right of Privacy under the Federal Constitution**

The United States Supreme Court's decision in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992) sets forth the limits that the 14th Amendment Due Process Clause of the United States Constitution imposes on the states' ability to interfere with abortion procedures. 505 U.S. at 874. In *Casey*, the Court held that a state has legitimate interests in protecting the life of the fetus, however, the Court held that the following two principles are paramount:

1. A woman has a right to an abortion before viability and to obtain it without undue interference from the state. *Id.* at 846.
2. Subsequent to viability, the state in promoting its interest in the potentiality of human life may ... proscribe abortion, except where it is necessary in appropriate medical judgment, for the preservation of the life or health of the mother. *Id.* at 879, quoting *Roe v. Wade*, 410 U.S. at 164-165.

Under *Casey*, state legislation that does not comply with these two principles may raise constitutional concerns.

In the 1980s Florida's rules governing first trimester abortions were challenged in the U.S. District Court, in a class action that resulted in a permanent injunction against those rules.<sup>2</sup> The rules required that a nurse and other personnel be employed to assist the physician performing the abortion. Rules have since been adopted that do not include the requirements that were found to impermissibly regulate first trimester abortions.

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<sup>2</sup>*Florida Women's Medical Clinic v. Smith*, (746 F.Supp. 89)

**Right of Privacy under the Florida Constitution**

The Florida Supreme Court has held that the express right of privacy in section 23 of article I of the Florida Constitution provides broader protection than that afforded by the U.S. Constitution. See *Winfield v. Division of Pari-Mutual Wagering*, 477 So.2d 544 (Fla. 1985). Therefore, any state regulation of a fundamental right is subject to the higher standard of review, i.e., strict scrutiny. The Florida Supreme Court has held that the right of privacy is “clearly implicated in a woman’s decision of whether or not to continue her pregnancy.” *In re T.W.*, 551 So.2d 1186, 1192 (1989) (statute for parental consent for a minor’s abortion declared unconstitutional). Therefore, any regulation regarding termination of pregnancy must be analyzed against whether the state has a compelling state interest and whether the state has satisfied its burden to justify its regulatory goal through the use of the least intrusive means. *Id.*, citing to *Winfield*, 447 So.2d at 547.

**V. Economic Impact and Fiscal Note:****A. Tax/Fee Issues:**

None.

**B. Private Sector Impact:**

Licensed abortion clinics could experience a modest increase in costs to revise or develop written policies and procedures to comply with expanded clinic rules.

**C. Government Sector Impact:**

AHCA does not anticipate a cost to the agency for implementation of this bill.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

The requirement that each abortion clinic develop policies to provide postoperative care of patients suffering from complications of an abortion will apply to abortions performed in the first trimester as well as those performed in the second and third trimesters. The rules would have to follow the trimester framework in order to avoid imposing an undue restriction on first-trimester abortions.

**VIII. Amendments:**

None.

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This Senate staff analysis does not reflect the intent or official position of the bill’s sponsor or the Florida Senate.

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# SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

BILL: SB 2296

SPONSOR: Senator Haridopolos

SUBJECT: Health Care

DATE: April 16, 2004

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Harkey <i>HN</i>	Wilson <i>JW</i>	HC	
2.			JU	
3.			GO	
4.			AHS	
5.			AP	
6.			RC	

## I. Summary:

This bill creates the "Women's Health and Safety Act;" amending s. 390.012, F.S., to require separate rules for abortions performed in licensed abortion clinics during the first trimester of pregnancy, and for those abortions performed in licensed abortion clinics after the first trimester of pregnancy. The bill requires the rules for clinics performing abortions after the first trimester to establish reasonable and fair minimum standards in specified areas.

The bill states that the rules may not impose an unconstitutional burden on a woman's freedom to decide whether to terminate her pregnancy. The bill provides a severability clause.

This bill amends s. 390.012, F.S., and creates two unnumbered sections of law.

## II. Present Situation:

### The Trimester Framework for State Regulation of Abortion

The landmark case of *Roe v. Wade*, decided in 1973, established that a woman's right to have an abortion is part of the fundamental right to privacy<sup>1</sup>. The decision in *Roe v. Wade*, established a "trimester framework" in which the balance between privacy of an individual woman's medical decision and a state's interest in protecting maternal health and the potential life of the fetus changed according to the trimester of the pregnancy. In the first trimester of pregnancy, abortion is viewed as a private medical decision. During the second trimester of pregnancy, the state's interest in protecting maternal health by regulating abortion becomes compelling. In the third trimester of pregnancy, when a fetus could survive outside the mother's body the state could ban abortions except in cases where abortion was necessary to save the life or health of the mother.

<sup>1</sup> 410 U.S. 113 (1973)

### **Regulation of Abortion Clinics**

The Agency for Health Care Administration (AHCA) and the Department of Health (DOH) have promulgated detailed rules regulating the licensure of and setting clinical standards for surgical facilities, including physicians' offices (Chapter 64B8-9.009, F.A.C.) and ambulatory surgical centers (Chapter 59A-5, F.A.C.). AHCA has also promulgated rules regulating abortion clinics (Chapter 59A-9, F.A.C.).

Under s. 390.012(1), F.S., AHCA's rulemaking authority for abortion clinics is limited to the promulgation of rules that are "comparable to rules which apply to all surgical procedures requiring approximately the same degree of skill and care as the performance of first trimester abortions." According to DOH and AHCA, since this statute was originally passed, abortions performed after the first trimester have become more commonplace. AHCA reports that the agency's authority to protect patient health is limited by the authorizing language in statute and rule, which sets the clinical standard for such rules at a level lower than that necessary to benefit patients receiving abortions after the first trimester of pregnancy.

There are currently 72 licensed abortion clinics. AHCA does not collect data that would allow it to know which of these clinics perform post-first trimester abortions.

AHCA's surveyors examine records in the front office of an abortion clinic; they do not inspect facilities. The local Fire Marshall would be responsible for inspecting the buildings.

Surveyors check for the following:

- That the license is current and posted in a conspicuous place.
- That abortions are performed only by a licensed physician.
- That fetal remains are disposed of in a sanitary and appropriate manner (inspector reviews the contract for biohazard disposal).
- That a complete, accurately documented clinical record is maintained on each patient.
- That clinical records are kept on file for at least 5 years.
- That the number of terminations of pregnancy is reported to the Office of Vital Statistics within the timeframe established in law.

### **Prohibited Acts**

Under s. 797.03, F.S., it is unlawful for any person to perform or assist in performing an abortion except in an emergency care situation, other than in a licensed abortion clinic, licensed hospital, or physician's office. It is unlawful for anyone to operate an abortion clinic without a license or to perform a third trimester abortion in any setting other than a hospital. A violation of these provisions is a second degree misdemeanor punishable under ss. 775.082 or 775.083, F.S.

### **Reports of Induced Termination of Pregnancy in Florida**

The DOH, Office of Vital Statistics, collects all statistical data and analysis on termination of pregnancies. Section 390.0112(1), F.S., requires the report to be filed with AHCA; however, it is

the practice of the agencies (DOH and AHCA) to direct the medical directors and physicians to file the report with DOH. Chapter 59A-9.034, F.A.C., requires that an abortion clinic must submit a cumulative report each month to the Office of Vital Statistics. AHCA licenses and inspects abortion clinics, but all reporting from physicians or medical directors regarding termination of pregnancies is sent directly to DOH, Office of Vital Statistics, where the data is entered and reports are prepared.

Reports are confidential and will not be revealed except under the order of a court. Statutorily, such reports include the following information:

- Number of procedures performed;
- Reason for pregnancy termination (personal choice, physical condition, mental condition, abnormal fetus, or other reason) which must be specified; and
- Period of gestation at the time such procedure was performed.

According to the Office of Vital Statistics, 87,964 abortions were performed in Florida in 2002. Of these, 78,997 were performed during the first trimester (at or under 12 weeks of gestation); 8,180 were performed in the second trimester (13-24 weeks of gestation); and 61 were performed in the third trimester (at or after 25 weeks of gestation). For 726 of the reported abortions the gestational age was unknown.

### **III. Effect of Proposed Changes:**

**Section 1.** Provides a popular title for the bill—"The Women's Health and Safety Act".

**Section 2.** Amends s. 390.012, F.S., to increase AHCA's authority to develop rules for licensed abortion clinics, particularly for those that perform abortions after the first trimester. The rules for first-trimester abortions must be comparable to those that apply to surgical procedures requiring approximately the same degree of skill and care as the performance of abortions during the first trimester.

Rules for clinics that perform, or claim to perform, post-first trimester abortions must provide reasonable and fair minimum standards for staffing, medical screening and evaluation of patients, supplies, facilities, space, equipment, follow-up care, and patient records. Patient records must be treated as medical records under chapters 458 and 459, F.S.

The bill requires the Agency to develop rules that would be in compliance with s. 797.03, F.S., which requires that all third trimester abortions be performed only in a hospital. The rules may not impose an unconstitutional burden, rather than a legally significant burden, on a woman's freedom to decide whether to terminate her pregnancy.

**Section 3.** Provides a severability clause. If any part of this act were determined to be invalid, those parts would be severable from the remainder of the act.

**Section 4.** Provides that the bill will take effect upon becoming a law.

**IV. Constitutional Issues:****A. Municipality/County Mandates Restrictions:**

The provisions of this bill have no impact on municipalities and the counties under the requirements of Article VII, Section 18 of the Florida Constitution.

**B. Public Records/Open Meetings Issues:**

The provisions of this bill have no impact on public records or open meetings issues under the requirements of Art. I, s. 24(a) and (b) of the Florida Constitution.

**C. Trust Funds Restrictions:**

The provisions of this bill have no impact on the trust fund restrictions under the requirements of Article III, Subsection 19(f) of the Florida Constitution.

**D. Other Constitutional Issues:****Right of Privacy under the Federal Constitution**

The United States Supreme Court's decision in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992) sets forth the limits that the 14th Amendment Due Process Clause of the United States Constitution imposes on the states' ability to interfere with abortion procedures. 505 U.S. at 874. In *Casey*, the Court held that a state has legitimate interests in protecting the life of the fetus, however, the Court held that the following two principles are paramount:

1. A woman has a right to an abortion before viability and to obtain it without undue interference from the state. *Id.* at 846.
2. Subsequent to viability, the state in promoting its interest in the potentiality of human life may ... proscribe abortion, except where it is necessary in appropriate medical judgment, for the preservation of the life or health of the mother. *Id.* at 879, quoting *Roe v. Wade*, 410 U.S. at 164-165.

Under *Casey*, state legislation that does not comply with these two principles may raise constitutional concerns.

In the 1980s Florida's rules governing first trimester abortions were challenged in the U.S. District Court, in a class action that resulted in a permanent injunction against those rules.<sup>2</sup> The rules required that a nurse and other personnel be employed to assist the physician performing the abortion. Rules have since been adopted that do not include the requirements that were found to impermissibly regulate first trimester abortions.

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<sup>2</sup>*Florida Women's Medical Clinic v. Smith*, (746 F.Supp. 89)

**Right of Privacy under the Florida Constitution**

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**V. Economic Impact and Fiscal Note:****A. Tax/Fee Issues:**

None.

**B. Private Sector Impact:**

Licensed abortion clinics could experience a modest increase in costs to revise or develop written policies and procedures to comply with expanded clinic rules.

**C. Government Sector Impact:**

AHCA does not anticipate a cost to the agency for implementation of this bill.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

On page 3, lines 23-25, the bill deletes a provision regarding rules for patient records. Similar language is included in the new rule requirements for abortion clinics performing abortions after the first trimester. It appears that the requirements regarding patient records would no longer apply to first trimester abortions.

**VIII. Amendments:**

None.

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This Senate staff analysis does not reflect the intent or official position of the bill’s sponsor or the Florida Senate.

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